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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 590

CLYDE E. CLAPPER,
Petitioner,

vs.

THE ORIGINAL TRACTOR CAB COMPANY, INC.,
AND STANLEY WILLIAMS,
Respondents.

PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Clyde E. Clapper, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit wherein attorneys' fees and expenses incurred in the patent infringement defense was included as an element of damages in the antitrust action, and a separate award of attorneys' fees for prosecution of the antitrust action is believed excessive in view of the amount of compensatory damage granted by the Trial Court in the antitrust action.

REPORTS OF OPINIONS DELIVERED IN COURTS BELOW.

The Seventh Circuit Court of Appeals' denial of Petitions for Writs of Mandamus filed by Petitioner's licensees, seeking to dismiss Respondents' counterclaim and cross-complaint for lack of proper venue, dated April 20, 1954, is reported at 212 F.2d 371.

The opinion of the District Court for the Southern District of Indiana, Indianapolis Division, dated January 13-14, 1958 and July 9, 1958, reported at 165 F. Supp. 565, is reproduced in the Appendix Exhibit A.

The Court of Appeals opinion dated September 30, 1959, reported at 270 F.2d 616, is reproduced in the Appendix Exhibit B.

Other decisions related to this case are Justice Whitaker's denial of Respondents' Motion to Intervene in a suit brought by the Government for antitrust violation instigated by Respondents, styled *United States* v. *Bearing Distributors Co. et al.*, filed in the Western District of Missouri, Western Division, reported at 8 F.R.D. 228 and the Final Judgment issued in the same case, unreported, but reproduced in the Appendix Exhibit C.

Mason City Tent & Awning Co. v. *Clapper et al.*, reported at 144 F. Supp. 754, is reproduced in the Appendix Exhibit D.

JURISDICTION AND JUDGMENT TO BE REVIEWED.

This Court has jurisdiction under Title 28, U.S. Code, Secs. 1254, sub-paragraph (1), and 2101, sub-section (c).

The judgment of the Seventh Circuit Court of Appeals sought to be reviewed was entered September 30, 1959. A certified transcript of the record in the case, including the proceedings in the Court of Appeals, is furnished herewith in compliance with Rule 21 of this Court.

An order dated November 25, 1959, granting 30 days extension of time within which to petition for certiorari, was granted by the Court of Appeals for the Seventh Circuit.

The conflict between the Second Circuit and the Seventh and Tenth Circuits as to construction of 15 U.S.C.A., Sec. 15, and 35 U.S.C.A., Sec. 285, is believed confers on this Court jurisdiction to review the above judgment by Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW.

1. Was it legally proper for the Court of Appeals in the instant case to include as an element of the trebled anti-trust damages, attorneys' fees and expenses allowed Respondents for defense of the patent infringement action?

2. Is the question posed in (1) above decided correctly by the Second Circuit in *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791, or by the Tenth Circuit in *Kobe, Inc.*, v. *Dempsey Pump Co.*, 198 F.2d 416, certiorari denied 73 S. Ct. 46, and by the Seventh Circuit in this suit?

3. Were the separate awards of attorneys' fees to Respondents, one for antitrust prosecution, the other for defense of the patent infringement action, trebled by the Appeal Court as an item of damage, legally proper in view of the fact that the basis for the patent defense award is the patent statute 35 U.S.C. 285 pertaining to attorneys' fees?

4. Were Respondents' proofs legally sufficient to justify the award of damages for antitrust violation and did the courts abuse their discretion in the amounts allowed for attorneys' fees both for antitrust prosecution and defense for patent infringement?

5. Were the separate awards of attorneys' fees to Respondents in the instant case, one for antitrust prosecution, the other for the defense of patent infringement, legally proper in view of the fact that Petitioner's licensees (so-called co-conspirators) had been absolved by Respondents of all liability for attorneys' fees both for the antitrust and patent defense of the case in a settlement arrangement and Petitioner had purged himself of such alleged misuse long prior to such settlement?

STATUTORY PROVISIONS INVOLVED.

The statutory provisions here involved are:

Title 15, U.S.C.A., Sec. 15:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Title 35, U.S.C.A., Sec. 285:

"The court in exceptional cases may award reasonable attorney fees to the prevailing party."

STATEMENT OF THE CASE.

This suit was instituted in April, 1950, as an action by the patentees Clyde E. Clapper and Lee Flora against The Original Tractor Cab Co. and Stanley Williams of Arlington, Indiana, for infringement of two patents, Clapper patent No. 2,452,834, and Flora patent No. 2,461,974, and the basis for jurisdiction of the Court of first instance was 28 U.S.C.A., Secs. 1331, 1332, 1338, 2201, 2202, and for the Counterclaim and Cross-Complaint, 15 U.S.C.A., Secs. 1, 4, 14, 15 and 26. Defendants, Respondents here, denied infringement, contested the validity of the patents, joined the licensees of the patents as cross-defendants and counterclaimed for misuse of the patents and antitrust violation.

Early in 1948, two years before this suit was filed, the United States Patent Office declared two interferences involving Clapper's application for patent and two other applications, one of Lee Flora of Fairmount, Illinois, and the other of Michael A. Halligan of Fort Dodge, Iowa. In April, 1948, a meeting was arranged in Chicago between Clapper, Flora and Halligan and their licensees and attorneys in an attempt to settle the interference contro-

In this Petition exhibits of Petitioner where referred to will be abbreviated "PX" followed by the numeral given the exhibit when marked; exhibits of Respondent will be abbreviated "DX" followed by the letter or letters given the exhibit when marked, and references to Petitioner's record, plaintiff below, will be abbreviated "PR", and references to Respondents' record, defendants below, will be abbreviated "DR" followed by the page numbers referred to.

versies. At the Chicago meeting proofs of the respective parties were compared and it was determined that Clapper and Flora should prevail and receive the patents covering a tractor heater and weather protection device which was the subject of the applications. An outgrowth of the Chicago meeting and settlement was the Group Agreement, PX 33, PR 491-502, between the inventors Clapper, Flora and Halligan, and their licensees signed at Des Moines, Iowa, August 3-4, 1948. By the terms of the Group Agreement Clapper's licensee, Bearing Distributors of Kansas City, later Comfort Equipment Co., Flora's licensee, the Cab-Ette Co. of Danville, Illinois, and Halligan's licensee, the Fort Dodge Tent & Awning Co., later Burch Manufacturing Co., were given the exclusive rights in the Clapper and Flora inventions and the patents when issued.

Infringers soon became active and among the first were the D & D Co., of Fort Dodge, Iowa, the Mason City Tent & Awning Co., of Mason City, Iowa, and the Original Tractor Cab Co., Respondent here. Notice of infringement was sent to these companies and that sent to Original Tractor Cab Co. was dated November 24, 1948, PX 119, PR 515. A second notice was sent to Original Tractor Cab Co., DX SS-3, PR 704, on August 20, 1949. Respondent Stanley Williams, president of Original Tractor Cab Co., after receiving the second infringement notice, solicited the group members to become a member and licensee under the patents, so a second meeting was arranged in Chicago on September 12, 1949, at which time representatives of the group, their attorneys, the inventors Clapper and Flora and their attorneys, met with Williams and his attorney. At this meeting Williams' request for license was considered and after full discussion was refused. At the same meeting Clapper made an agreement with Williams, afterwards confirmed in writing, that The Original Tractor Cab Co. would discontinue the manufacture of the

infringing Half Cabs if Clapper would permit the company to dispose of the inventory it had on hand, PX 120, through PX 124, inclusive, PR 243-245; 515-521.

Immediately after the Chicago meeting in September, 1949, and while respondents were supposedly disposing of their inventory under the agreement made with Clapper, Williams made a working arrangement with the Cab-Ette Co., a member of the group and a licensee under the Clapper and Flora patents, so he and his company could continue the manufacture and sale of the accused Half Cabs, designating them as "Original Cab-Ettes", PR 175-176, 189-190. The general terms of this arrangement are contained in PX 1, and the date of its commencement is fixed by the corporate minutes, PX 174, PR 601-604. These Original Cab-Ette tractor covers were identical to the Half Cab covers previously manufactured by the Original Tractor Cab Co., except for the name "Original Cab-Ette" which was substituted by stencilling on the cover for the name "Original Half Cab". Also on these Original Cab-Ette covers manufactured and sold under this working arrangement were printed the patent numbers of both the Clapper and Flora patents, indicating they were made under license. PX 25, PR 486. A royalty was paid by Respondents to the patentee Clapper on all Original Cab-Ette covers made during the working arrangement, PX 30-31, PR 488-489. Contemporaneously with this working arrangement between Respondents and the Cab-Ette Co., Williams advised his distributors that they need not have further anxiety over infringement of the Clapper patent, PX 47A and 180, PR 513-514 and 620.

Disagreement arose between Respondents and the Cab-Ette Co., so by the end of November, 1949, the working arrangement was terminated, PX 32, PR 490. Thereafter Respondents had only to change the marking of the covers from "Original Cab-Ette" to "Original Half Cab" and noti-

fied Clapper the company was resuming manufacture, thereby renouncing the agreement made with Clapper at the Chicago meeting on September 12, 1949, PX 124, PR 521. The foregoing circumstances culminating in the breach by Respondent Williams of the Chicago agreement led to the filing of the complaint in the instant case on April 14, 1950.

The prosecution of the case progressed slowly during the early stages because of the discovery proceedings and the heavy docket of the Trial Court. Three years between June 15, 1951 and May 10, 1954, were consumed in the determination of the propriety of joining the licensees of Clapper and Flora as cross-defendants in this suit, so during this period the prosecution of all other issues in the case was stayed. Petitioner Clapper took no part in this phase of the case. In December, 1950, Respondents were offered a license under the Clapper patent by Petitioner's attorney, but the offer was refused, PX 133-134, PR 303, 522-523.

About a year after the complaint in this case was filed, the Department of Justice, instigated by Respondents, filed suit in the Western District of Missouri, Civil Action No. 6895, against the cross-defendant licensees, and the patentees Clapper and Flora, for violation of the antitrust laws. That action was terminated by a Consent Decree dated October 27, 1953, Appendix Exh. C, pp. A107-A114. During the pendency of the Government suit, the objectionable Group License, PX 33, was terminated by an agreement dated May 6, 1953, PX 137 and PX 137A, PR 532-536, which made termination of the agreement effective as of November 15, 1952. All infringers who had been noticed by the patentees Clapper and Flora, including Respondents, were sent a copy of the Consent Decree which made an offer of license obligatory upon the patentees Clapper and Flora, PX 135, PR 523. No mention

was made in the Consent Decree which terminated the Government suit of the instant case, although the Government suit and this case were pending and being prosecuted simultaneously. Upon termination of the Group License new licenses were immediately negotiated and signed by the group members, and separate licenses were negotiated and granted to manufacturers who had not been members of the group, PX 138 and PX 151, PR 536, 553-558, and PR 247-248. On December 14, 1954, the patentee Flora and the three cross-defendants, Comfort Equipment Co., Burch Manufacturing Co., and Cab-Ette Co., who had previously been members of the group, made settlement with Respondents upon payment of One Hundred Ten Thousand Dollars ($110,000.00) PX 172, PX 173, PR 590-601. By the terms of settlement the parties attempted to preclude Clapper from any and all advantages resulting therefrom and at the same time the cross-defendant licensees and Flora contracted with Respondents' attorneys that under the settlement the latter waived all claim to attorneys' fees that might be claimed for their prosecution of this case, PX 199, PX 200, PR 431-435.

By January, 1955, through such discovery as Petitioner was able to obtain in spite of Respondents' misrepresentations as to the destruction and non-existence of pertinent records, Petitioner amended his complaint bringing into the case the Original Cab-Ette working arrangement and the breach of contract issues previously mentioned besides patent infringement, and it was upon this pleading and the responsive pleadings thereto that the case was tried from June 3 to 28, 1957. By its first Memorandum Opinion dated January 3, 1958, the Trial Court found that Respondents were entitled to recover compensatory damages in the following amounts:

(1) Costs resulting from forced stoppage of production, from August 22, 1949 through September 23, 1949	$ 2,561.45
(2) Expenses incurred in finance negotiations	317.20
(3) Advertising costs rendered useless by reason of forced work stoppage	4,563.70
(4) Loss of potential sales to Farm Equipment Sales Co. for the years 1949 through the first eleven months of 1956	12,263.40
(5) Loss of potential sales to Stover-Winsted Co. for the years 1949 through the first five months of 1952	7,905.60
	$27,611.35

Appendix Exh. A, p. A39.

This assessment, when trebled, amounted to $82,834.05. By crediting against this sum the $110,000.00 paid by cross-defendants' licensees under the Settlement Agreement of December 14, 1954, the liability of Clapper for compensatory damage was liquidated. The Trial Court, however, further held that there remained a liability for the payment of Respondents' attorneys' fees for services rendered in defending the patent infringement action which the Court decided fell within the category of "exceptional cases" under Title 35 U.S.C.A. 285. The allowance for such services was in an amount of $28,244.31. In addition to the payment of the attorneys' fees in connection with the patent infringement action, the Trial Court stated Respondents were entitled to recover from Clapper reasonable attorneys' fees for services of their attorneys in the prosecution of the counterclaim and cross-complaint for antitrust violations on the part of Clapper, Flora and the co-defendant licensees. The Trial Court also assessed against Clapper the entire costs of

suit expended by Respondents in their defense to each cause of action of the complaint and in the prosecution of the counterclaim and cross-complaint for antitrust violation, Appendix Exh. A, pp. A68-A69. By its second Memorandum Opinion dated July 9, 1958, included in Appendix Exh. A beginning at page A41, the Trial Court allowed Respondents' attorney $25,000.00 for prosecution of the antitrust phase of the case with this comment:

> "The court is well aware that this sum represents just a little less than the compensatory damage found to have been sustained by defendants, but except for the difficulty of proof, it is ventured that the actual damage suffered as a direct result of the violation of the antitrust laws by the plaintiff and his co-conspirators would have been found to be far greater." Appendix Exh. A, p. A48.

A Bill of Costs totaling $39,257.26, Appendix Exh. A, pp. A49-A50, submitted by Respondents upon objection by Petitioner was reduced and assessed by the Trial Court in an amount of $2,706.43, Appendix Exh. A, pp. A68-A69. An appeal was taken by both Petitioner and Respondents, and the Court of Appeals decision was rendered September 30, 1959. Appendix Exh. B, pp. A70-A106.

A chart of this Statement of Facts presenting some of the more important events and circumstances arranged in chronological order is bound in at this point covering the period from the first Chicago meeting, in April, 1948, through the Court of Appeals decision September 30, 1959.

STATEMENT OF FACTS CHRONOLOGY

Chicago Meeting - Interferences Settled	Apr. 28	
Group License (Px 33) signed	Aug. 3, 28	
First Notice of Infringement (Px 119) sent Respondents	Nov. 22, 48	
Second Notice of Infringement sent Respondents (Px 55-3)	Aug. 20, 49	
Second Chicago Meeting - Clapper Williams Agreement (Px 120 through Px 124)	Sept. 12, 49	
Respondent - Cabelle Working Arrangement	Sept. 15 - Nov. 10, 49	
Complaint Filed CA 2255 District Court S.D. Indiana	Apr. 14, 50	
Petitioner's Offer of License (Px 38) refused by Respondents	Jan. 3, 51	
Government Suit CA 6895 for Anti-Trust Violations filed in Western District of Missouri	Apr. 27, 51	
Petitioner's Licensees joined as Cross Defendants in CA 2255	June 8, 51	
Cross Defendants' Motion to Dismiss for Improper Venue	June 15, 51	
Group License (Px 33) terminated as of this Date	Nov. 15, 52	
Consent Decree in Government Anti-Trust Suit CA 6895 (Px 136)	Oct. 27, 53	
Venue Question terminated by Mandate CA 7th Circuit	May 10, 54	
Settlement and Dismissal of Patentee Flora and Cross Defendants	Dec. 4, 54	
Release and Waiver of Claims of Respondents' Attorneys and Attorneys' Liens	Dec. 14, 54	
Amended Complaint in CA 2255 Filed	Jan. 13, 55	
	1956	
Trial CA 2255 Dist. Court S.D. Ind. Indianapolis Div.	June 3 - 28, 57	
Trial Court's 1st Opinion (Findings of Facts and Conclusions of Law) — Damages for Anti-Trust Violation and Attorneys' Fees for Prosecution of Patent Phase of Case assessed against Petitioner	Jan. 3, 58	
Judgement in CA 2255	Jan. 14, 58	
Petitioner's Motion for Admission of Exhibits 199 and 200 being an Agreement and a Waiver and Release of Attorneys' fees dated Dec. 4, 1954	June 19, 58	
Trial Court's 2nd Opinion (Memorandum Entry) — Costs and Attorneys' Fees for Prosecution of Anti-Trust Phase of Case Assessed against Plaintiff	July 9, 58	
Court of Appeals' Decision	Sept. 30, 59	

ARGUMENT.

Questions 1 and 2.

Title 15, U.S.C.A., Sec. 15 of the Sherman Antitrust Act provides that besides recovery of three-fold the damages sustained, the person injured shall also recover the "cost of suit, including a reasonable attorney's fee." From the language of this section of the statute, it is evident that the attorney's fee provided is for prosecution of the antitrust phase of the case and is something separate and distinct from the damages recovered, the latter being trebled, while the attorney's fee is for a definite amount to be fixed by the court.

The instant case was brought for patent infringement and antitrust violation was charged by the counterclaim and cross-complaint. The Trial Court in allowing an attorney's fee fixed the amount at $25,000.00 for prosecution of the antitrust violation and $28,244.31 for prosecution of the patent infringement phase. With respect to the latter, the Court found as Fact Number 71:

> "71. The evidence shows that the defendant, Original, has incurred in fees and expenses obligations for $28,244.31 in defense of the patent infringement action instituted by the plaintiff and Flora as a part of the conspiracy in violation of the antitrust laws. The court finds these legal fees and expenses to be reasonable for the services rendered by counsel for the defendant, Original, in the defense of the patent infringement litigation, and should be awarded to defendant's counsel for such services. Said sum, however, is not to be included as an element of damages in the antitrust action to be increased threefold, as defendants would have the court do. It is to be awarded counsel for the

defendants by reason of their representing the successful parties in the patent infringement action, and by reason of the exceptional circumstances involved in the case concerning the validity of the patent and its use by the patentee and his licensees, all as found in these findings of fact." Appendix Exhibit A, p. A27.

This award for patent infringement prosecution was obviously made under Title 35, U.S.C., Sec. 285, providing in patent cases an award of "reasonable attorney fees to the prevailing party" in "*exceptional cases*".

The Court of Appeals in reversing the District Court as to how this award should be assessed stated:

"* * * In the case before us the District Court's finding of fact No. 71 states this to be an 'exceptional' case, and directs award of attorneys' fees for that reason. Defendants argue that the award is inadequate. They liken the situation here to that in Kobe, Inc., v. Dempsey Pump Co., D.C. Okla. (1951), 97 F. Supp. 342, 89 USPQ 54, affirmed 10 Cir., (1952) 198 F.2d 416, 94 USPQ 43, cert. den. 344 U.S. 837, 95 USPQ 417. There attorneys' fees incurred in defense of a patent infringement suit were held to be recoverable as damages sustained through antitrust violations. Here the District Court declined to include the attorneys' fees incurred in the patent infringement defense as an element of damages in the anti-trust action (to be increased threefold)." (Appendix Exh. B, p. A83.)

Then after quoting a part of the District Court's finding No. 71, the Appeal Court further commented:

"However, the District Court made no specific finding that the adverse party had been guilty of bad faith, inequitable, or unconscionable conduct 'in the case concerning the validity of the patent'. These are the usual bases for awarding attorneys' fees in patent cases. Continental Art Co. v. Bertolozzi, 7 Cir. (1956) 232 F.2d 131, 134, 109 USPQ 231, 233-234; Wilson v.

Seng Co., 7 Cir. (1952) 194 F.2d 399, 404, 92 USPG 197, 201; Apex Electrical Mfg. Co. v. Altorfer Bros. Co., 7 Cir. (1956) 238 F.2d 867, 874, 111 USPQ 320, 324-325. On the other hand, the District Court's reference to use of the patent by the patentee and his licensees can have reference only to the anti-trust violations. The record of this eight-year long litigation fully supports such a finding and defendants are entitled to have their reasonable attorneys' fees and expenses included as an element of damages in the anti-trust action." (Appendix Exh. B. p. A84).

This brings the instant case under the doctrine of *Kobe, Inc., v. Dempsey Pump Co., supra*, except that in the Kobe case the District Court made the award of attorney fees for defending the action for patent infringement solely as a damage item to be trebled and specifically denied such fees as allowable under the patent statute. The District Court's finding 80 in the Kobe suit reads:

"80. Attorneys' fees of the Defendants in the infringement action and the unfair competition action have been allowed as damages upon Defendants' counterclaim under the antitrust laws, but are denied under the provisions of Title 35, U.S.C.A., Sec. 70 (now Sec. 285), and the Court finds that circumstances requiring an award under the latter statute are not shown by the record." (Parenthesis ours). 97 F. Supp. 342 at 354.

Judge Parkinson in the instant case dissented to that portion of the majority opinion reversing for failure to include attorney's fees and expenses in defense of the patent infringement phase of the case as an element of treble damages. He recognized that the award was made by the District Court under Title 35, U.S.C.A., Sec. 285. and that that Court specifically refused to include it as an element of damage in the antitrust action. He pointed

out, as did the Court in *Straus* v. *Victor Talking Machine Co.*, 297 Fed. 791 at 797, that:

> "When 15 U.S.C.A., Sec. 15, was enacted by Congress, the word 'damages' had acquired, through judicial interpretation, a well understood legislative meaning and it did not include attorney fees incurred in defending civil actions. *Oelrichs* v. *Spain*, 1872, 82 U.S. 211, 231; *Flanders* v. *Tweed*, 1872, 82 U.S. 450, 453; *Tullock* v. *Mulvane*, 1902, 184 U.S. 497, 511; *Missouri, Kansas etc., R'y Co.* v. *Elliott*, 1902, 184 U.S. 530, 539-540; *Straus* v. *Victor Talking Mach. Co.*, 2 Cir., 1924, 297 Fed. 791, 797. There is nothing in the Act to the contrary, and, in my opinion, any legal basis for an attorney fee allowance in the successful defense of the patent infringement phase of this action could emanate from and find its source only in 35 U.S.C.A., Sec. 285." Appendix Exhibit B, p. A105.

Commenting on the *Kobe* and *Straus* cases, *supra*, he had this to say:

> "As I read the case of *Kobe, Inc.*, v. *Dempsey Pump Co.*, 10 Cir., 1952, 198 F.2d 416, I am impressed with the thought that the question of the right to include counsel fees incurred in the successful defense of a patent infringement suit as an element of damage in an antitrust action was not squarely raised and decided by the Tenth Circuit, although the District Court so held. However, if the Tenth Circuit did so decide, I am constrained to disagree and am of the opinion that the Second Circuit was correct in its decision in *Straus* v. *Victor Talking Mach. Co.*, 297 Fed. 791." (Appendix Exh. B, pp. A105-A106).

The decision of the Second Circuit Court of Appeals in the Straus case bears closer scrutiny because it is the only tribunal that squarely meets the question as to whether the bringing of suit to establish rights such as a suit for infringement of a patent may constitute "a step

in pursuance of the combination" or conspiracy in an antitrust action. The decision of the Court of Appeals of the Second Circuit in the *Straus* case, 297 Fed. 791 at 797, reads:

> "What the court held, and what plaintiffs now contend, is, when simply stated, that resort to the courts, if unsuccessful, may be a step in violation of the statutes here concerned, and that a jury may so find, and award as part of the damage the fees of the attorneys of the successful party. If Victor Company had been successful, plaintiffs would not be here; for, in that event, the license agreements would have been held lawful. We think this mere statement displays the error in this regard.
>
> "The sections of the statutes (noted in the margin) speak of the 'damages by him sustained.' 'Damages' must be construed as that term was known to the law when these acts were passed. Kepner v. United States, 195 U.S. 100, 124, 24 S. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655. As said by the Supreme Court in Pennsylvania Railroad Company v. International Coal Company, 230 U.S. 184, 33 S. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, when construing section 8 of the Interstate Commerce Act (Comp. St., Sec. 8572):
>
> > 'The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained.'
>
> "In various classes of cases, 'damages' have been held not to include counsel fees incurred in defending civil actions. Oelrichs v. Spain, 15 Wall. 211, 21 L. Ed. 43; Flanders v. Tweed, 15 Wall. 450, 21 L. Ed. 203; Tullock v. Mulvane, 184 U.S. 497, 22 S. Ct. 372, 46 L. Ed. 657; Missouri, Kansas, etc., Railway Co. v. Elliott, 184 U.S. 530, 22 S. Ct. 446, 46 L. Ed. 673.

"We think the question here is not one as to 'probable cause', and much that is argued by both sides upon that point may be passed by. Whether an action will lie in the federal courts to recover damages for the prosecution of a civil action or suit instituted maliciously and without probable cause has not yet invited determination by the Supreme Court, although other courts have declined to entertain such actions. Tamblyn v. Johnston, 126 Fed. 267, 62 C.C.A. 601; Ray v. Law, 1 Pet. C.C. 207, Fed. Cas. No. 11,592; Potts v. Imlay, 4 N.J. Law 330, 7 Am. Dec. 603; Quartz Hill Gold Mining Co. v. Eyre, L.R. 11, Q.B. 674. Per contra, in certain circumstances and with certain limitations: Willard v. Holmes, Booth & Haydens, 142 N.Y. 492, 496, 37 N.E. 480; Ferguson v. Arnow, 142 N.Y. 580, 37 N.E. 626; Burt v. Smith, 181 N.Y. 1, 5, 73 N.E. 495, 2 Ann. Cas. 576; Wade v. National Bank of Commerce, (C.C.) 114 Fed. 377; Wilkinson v. Goodfellow-Brooks Shoe Co., (C.C.) 141 Fed. 218.

"We think the question goes deeper, and we place our decision on a ground more fundamental. Free access to the courts must neither be denied nor penalized. Of this principle, the case at bar is a perfect illustration. When the suit of Victor v. Straus was brought, the most which can be said against Victor Company is that the questions litigated were debatable. The court of last resort to which an appeal could be taken without permission by way of certiorari had declared in 230 Fed. 449, 144 C.C.A. 591, that Victor Company was right. The Supreme Court on certiorari reversed on the same day upon which it announced repudiation of Henry v. Dick, supra. In such circumstances, to say that a suit brought to determine rights may be a part of a scheme to violate statute law, and, if so, that the suitor may be subject to respond in damages, is to announce that he who seeks the judgment of the courts does so at his peril."

It was a coincidence that Judge Manton dissented to the majority opinion in the Straus case as did Judge Parkinson in the instant suit.

"I dissent from the disallowance of damages sustained by the plaintiff below for counsel fees paid for defending the alleged patent infringement suit. There the bill was held to have no merit, and, on the contrary, it was, in substance, held to be a disguised attempt to control the prices of its machines after they were sold and paid for. Straus v. Victor, 243 U.S. 490, 37 S. Ct. 412, 61 L. Ed. 866, L.R.A. 1917E, 1196, Ann. Cas. 1918A, 955. It brought forth the following statement in the opinion:

> "That the plaintiff comes into court with a bill to enjoin the defendants from reselling machines secretly sold to them in large numbers by the plaintiff's agents indicates very clearly that, at least until the exigency out of which this case grew arose, the scheme was regarded by the plaintiff itself and by its agents simply as one for maintaining prices by holding a patent infringement suit in terrorem over the ignorant and the timid."

"Thus the purpose was plain to the Supreme Court on the plaintiffs' own bill. Moreover, complete evidence presented to the jury below resulted in a finding by it that this so-called patent infringement suit was not brought in good faith or candor, and was a step in an unlawful conspiracy, the purpose of which was to maintain an illegal system for maintaining prices.

* * *

"Thus the theory of liability for counsel fees is based on the nature of this conspiracy action under the Sherman Law. In the cases referred to in the prevailing opinion (Oelrichs v. Spain, 15 Wall. 211, 21 L. Ed. 43; Flanders v. Tweed, 15 Wall. 450, 21 L. Ed. 203; Tullock v. Mulvane, 184 U.S. 497, 22 S. Ct. 372,

46 L. Ed. 657; Mo., Kan., etc., Ry. v. Elliott, 184 U.S. 530, 22 S. Ct. 446, 46 L. Ed. 673), there is no finding of fact, as here, that the bringing and prosecution of the suits were part of the unlawful scheme and design to make effective the chief object of the unlawful conspiracy. The general principle of the cases cited has long been recognized, and seems to be by the plaintiffs below. They adhere to the rule that the mere bringing and prosecution of a suit is not a wrongful act, without regard to its merits or its outcome. Resort to the courts is an individual's legal right, and counsel fees are denied as damages, not because they are incapable of being an element of damages, and directly resulting from violation of right, but because in such cases the bringing of suit was not a wrongful or illegal act, and no legal right was therefore violated. But this suit was wrongful, and found to be an illegal act. It was begun to accomplish an illegal end (so the jury found), and the authorities based on the proper exercise of a legal right, have no application. This is an action in tort, and the damages recoverable depend upon whether the act complained of is unlawful. Whether damages are recoverable under the Sherman Law depends upon whether the act or acts complained of are within the prohibition of the statute. If they are, and therefore illegal, and are the direct cause of injury, then under section 7 such damages are recoverable.

* * *

"There is a finding here that the motives and inducements of a suit decided adversely to the defendants below affected the combination and constituted a wrong. The Sherman Law is a limitation of rights which may be pushed to evil consequences, and therefore restrain, even though the offender depends upon patent rights or a license thereunder. Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 33 S. Ct. 9, 57 L. Ed. 107. No rule of public policy giving free access to the courts is available to the defendants be-

low, who, after a trial, have been found to have used the court as an instrument to accomplish unlawful acts and as a means to profit by an illegal conspiracy. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007. Statutory costs were never intended as compensation for an action wrongfully maintained.

"Nor is this an action for malicious prosecution. It is for unlawful conspiracy, followed by wrongful acts, among which is the institution and maintenance of this so-called patent suit. Probable cause for the suit is important in the defense of a malicious prosecution action, but the plain issue here was whether or not the so-called patent suit was oppressively maintained and used as an instrument for the unlawful combination to suppress and destroy competition. Here there was first established the combination, and thereafter the evidence surrounding the patent litigation was received. It was shown to be directly in line with the objects of the conspiracy. In resisting that suit, the plaintiffs below incurred the counsel fees which they now seek in reimbursement as an element of damage resulting from the wrongs committed against them by this unlawful combination in restraint of trade. This defense was imperative, in order that the plaintiffs below might protect their rights as against the tortious conduct of the defendants below. They were obliged to do this to meet the wrongdoing of the defendants below, and the counsel fees incurred were an immediate and direct result.

* * *

"A suit of the nature prosecuted by the defendants below is peculiarly a strong instrument in the hands of an unlawful combination to suppress and destroy competition. The sinister intent and illegal object of the basic conspiracy in which the suit is but a step, and yet an integral part, and constitutes a wrongful act, is the material object. The Supreme Court said in Straus v. Victor Co., 243 U.S. 490, 37

S. Ct. 412, 61 L. Ed. 866, L.R.A. 1917E, 1196, Ann. Cas. 1918A, 955:

> 'Convinced * * * that the purpose and effect of this "Licensed Notice" of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and of the public, we conclude that it falls within the principles of Adams v. Burke, 17 Wall. 453, 456, 21 L. Ed. 700, 703, and of Bauer v. O'Donnell, 229 U.S. 1, 57, * * * that it is therefore invalid, and that the District Court properly held that the bill must fail for want of equity.'

* * *

"The allowance of counsel fee as an element of damage in the instant case must be considered with due regard for the intention of Congress in providing for compensatory damages for wrongs committed under the Sherman Act. Undoubtedly, the direct consequences of the wrongful act of the defendant below was the expense of the employment of counsel. Reasonable value of this service is fixed by the testimony. Evidence as to the reasonableness of the service and the value thereof is as common as fixing the value of labor in any other pursuit. Head v. Hargrave, 105 U.S. 49, 26 L. Ed. 1028. The practical effect of such a loss under such circumstances as this record discloses calls for that progress in the law as to meet the progress of the times. The fact that the statute trebles the damages does not affect the situation. The Sherman Act is to be liberally construed to repress the evil and advance the remedy. Chattanooga Foundry Co. v. Atlanta, 203 U.S. 390, 27 S. Ct. 65, 51 L. Ed. 241; Ware, etc., Tobacco Co. v. American Tobacco Co. (C.C.) 178 Fed. 117."

(297 Fed. 808-812.)

The dissenting views of Judge Manton in the Straus case and Judge Parkinson in the instant case point up the divergence of opinions the courts have had with respect to the meaning of the language of this section of the statute. It is submitted that this conflict begs intervention by this tribunal to promulgate, establish and decree how the section should be interpreted.

It is also significant to note with regard to these first two questions presented for review the difference in the facts involved in the Kobe and Straus cases as compared with those in the instant suit. In the Kobe case the Oklahoma Court was dealing with a still existing antitrust violation in which a large number of patents were used to maintain a total monopoly, while any antitrust violation in which petitioner Clapper may once have been involved had ceased more than four years prior to the trial of the present case. Unlike the Kobe case, Clapper was not currently, at the time of the trial, using a large collection of ninety patents to maintain a complete monopoly in an industry, but had only one patent and for some time had been granting licenses thereunder to anyone and everyone who asked for one; Kobe never granted a single license. In the Straus case the patent holder had abandoned its objectionable licensing practice before trial of the antitrust action in which the question of trebling attorney's fees for defense of the patent litigation arose, and the same is true here. In this regard, petitioner is even more free of criticism than was true of the patent holder in the Straus case, for there the patent holder abandoned its objectionable practice only after there had been a judicial determination, appealed all the way to the Supreme Court, that it was in fact an illegal practice. Petitioner, on the other hand, abandoned the objectionable licensing arrangement of August 3-4, 1948, PX 33, long before there was any judicial determination of its validity.

Question 3.

The Trial Court in this case, upon arriving at the amount allowed respondents for the defense of the patent action, found:

> "71. * * * It is to be awarded counsel for the defense by reason of their representing the successful parties in the patent infringement action and by reason of the exceptional circumstances involved in the case concerning the validity of the patent and its use by the patentee and his licensees, all as found in these findings of fact."

By this finding the Court unqualifiedly intended that the fee was awarded under Title 35, U.S.C.A., 285, because it not only used the terminology of the patent statute pertaining to attorney's fees, but included limiting language to exclude it from the damage assessment.

> "Said sum, however, is not to be included as an element of damages in the antitrust action to be increased three-fold." Appendix Exh. A, p. A27.

In this regard the instant case is clearly distinguishable from the Kobe case for there the Oklahoma District Court found:

> "80. Attorneys' fees of the Defendants in the infringement action and the unfair competition action have been allowed as damages upon Defendants' counterclaim under the antitrust laws, but are denied under the provisions of Title 35, U.S.C.A., Sec. 70 (now 285), and the Court finds that circumstances requiring an award under the latter statute are not shown by the record (Parentheses added). 97 F. Supp. 342, at 354."

From these findings in the respective cases it is obvious that the attorney's fees here were levied under the

patent statute and in the Kobe case as an item of damage, specifically exempted from the patent statute.

The Appeal Court in the instant case then adopted the amount of the award made by the lower court under the patent statute and proceeded without evident authority to assign to it a new designation so it could be trebled with the compensatory damage assessment. To justify this shift and bring the findings in closer conformity with the Kobe case, the Court had this to say:

> "* * * the District Court made no specific finding that the adverse party had been guilty of bad faith, inequitable or unconscionable conduct in the case 'concerning the validity of the patent'. These are the usual bases for awarding attorneys' fees in patent cases (Citing cases). On the other hand the District Court's reference to use of the patent by the patentee and his licensees can have reference only to antitrust violation. The record of this eight-year long litigation fully supports such finding and defendants are entitled to have their reasonable attorneys' fees and expenses included as an element of damages in the antitrust action." Appendix Exh. B, p. A84.

As far as petitioner has been able to determine, the patent statute pertaining to attorney's fees, 35 U.S.C.A. 285, never contemplated that an award thereunder should ever become an item of damage to be trebled under the antitrust laws. Attorney's fees and expenses attending the defense of a patent infringement action where such action forms a part of an antitrust suit, although the patent phase be considered a part of a conspiracy, would seem more logically included as a part of the attorney's fees awarded under the section of the Sherman or Clayton Acts pertinent thereto, since the prosecution of both actions is invariably simultaneous and the order of proofs closely related.

Questions 4 and 5.

Damages As to Loss of Potential Sales to Farm Equipment Sales Co. and Stover Winsted (Items of Damage 4 and 5. Appendix. Exhibit A. p. A39).

Respondents treated a statement of losses (DX JJJ. DR 172-175) prepared by their accountant as firm proof of the fact that Farm Equipment Sales Co. would, except for the alleged conspiracy, have purchased all of their tractor covers from respondents rather than Comfort Equipment Company. The record, however, clearly reveals that this is an altogether unwarranted conclusion and that Farm Equipment Sales Co. fully intended to sell simultaneously tractor covers manufactured by both Comfort Equipment and respondents. The testimony of Harold McVicar, president of Farm Equipment, is unequivocal on this point, PR 902. McVicar's testimony is corroborated by a letter to respondent Original Tractor Cab Co., DX KKK-2, PR 904.

Since Comfort Equipment Co. and Original Tractor Cab tractor covers were to be handled together by Farm Equipment, the best that respondents could have hoped for was, at most, one-half of the business, and there was no showing that they could have achieved even that amount of business. Accordingly, respondents should have had recovery for no more than 4,542 units (one-half of the sales of Comfort Equipment to Farm Equipment).

With respect to the alleged Comfort Equipment tractor covers purchased by Stover-Winsted upon which loss of potential sales to Stover-Winsted is based, there is not one shred of evidence to substantiate the award. The figures arrived at were obtained from a note on the statement of losses, DX JJJ, reading:

"Supplied by Attorney P. Swecker from Answers to Interrog." PR 711.

These figures are not, however, to be found in the record of this case either in "Answers to Interrog." or elsewhere. It is thus seen that the figures relied upon for loss of potential sales of Farm Equipment and Stover-Winsted, the largest items in the damage assessment in this case, have no competent evidence which would constitute a basis of proof and certainly not that required in antitrust violation cases. There is no competent evidence that Comfort Equipment Co. sold any tractor covers to Stover-Winsted in 1952, and to average the alleged sales made the preceding year is to engage in arrant speculation.

In fact, the record is barren of evidence as to the number of tractor covers purportedly purchased from Comfort Equipment by Stover-Winsted in the years 1949 through 1952 upon which a legitimate estimate could be made as to the number of tractor covers respondents could have sold Stover-Winsted during the same period. The District Court's award of damage in the case of these two companies was therefore based on nothing more than assumption, speculation and conjecture, and not upon competent proofs.

It is established by the evidence before the Trial Court that when respondent Original Tractor Cab Co. first solicited Farm Equipment in 1949 to become a distributor, Farm Equipment was already an established distributor of Comfort Equipment Co. Farm Equipment Co., however, agreed to handle the tractor covers of both companies, affording Farm Equipment two sources of supply and two lines of differently priced tractor covers. As matters developed, the plan was never put into effect and Farm Equipment never handled any tractor covers except those of Comfort Equipment. From 1949 through 1956

Farm Equipment purchased from Comfort Equipment 9,084 tractor covers and an undetermined number purchased before respondents obtained their first and only order from Farm Equipment, so there is no competent evidence as to what portion of Farm Equipment purchases of tractor covers would have been given Comfort Equipment and what portion to respondent Original Tractor Cab Co. after August of 1949.

Furthermore, there is no evidence that Stover-Winsted ceased purchasing from respondents as the result of any act on the part of petitioner or any of the alleged co-conspirators. The utter failure of respondents to prove loss of potential sales to either Farm Equipment or Stover-Winsted should have been adequate grounds for reducing the damage award in an amount of the estimated potential sales of Farm Equipment and Stover-Winsted scheduled in the Trial Court's finding 72. Appendix Exhibit A, page A28.

Proofs to establish the first three items of damage, namely:

(1) Costs resulting from forced stoppage of production in an amount of $2,561 45.

(2) Expenses incurred in finance negotiations, $317.20.

(3) Advertising costs rendered useless by reason of forced work stoppage, $4,563.70.

(Appendix Exhibit A, page A39)

are likewise as questionable as those adduced to prove loss of potential sales to Farm Equipment and Stover-Winsted.

> "The Congress, by allowing private actions, in aid of enforcement of anti-trust policy, did not intend to allow a person representing himself, or a group to bring an unlimited action for an unspecified amount, upon the bare allegation that a conspiracy exists. The

Congress intended to confine the remedy to persons who are actually damaged in their business, and damaged in a measurable amount.

"The Court of Appeals for the Seventh Circuit, in a noted case, made this statement:

> "'Injury in his business or property is a prerequisite to a person's right to maintain an action for treble damages.'" (Peller v. International Boxing Club, 7 Cir., 1955, 227 F.2d 593, 595).

"All courts agree that the damages of which the section speaks are not the type of general damages that are recoverable for an ordinary tort, but rather damages actually sustained, which are susceptible of measurement." *Hess* v. *Anderson, Clayton Co.*, 20 F.R.D. 466 (1957).

Respondent's business was not destroyed, nor was it affected by the alleged conspiracy of petitioner and his licensees, as is shown by the Condensed Earnings Statement of Original Tractor Cab Co. for the years 1948 through 1956, incorporated in its accountant's report, DX JJJ, DR 175.

CONDENSED EARNING STATEMENT BY YEARS FOR THE PERIOD OF 1948 THROUGH 1956.

Total A. W. Cabs & H Cabs

	Profit	Loss
1948	$ 8,596.70	
1949		$13,958.67
1950	902.26	
1951	23,501.59	
1952	9,182.19	
1953		1,803.94
1954	85,584.27	
1955	3,593.44	
1956		25,762.07

After a loss of slightly less than $14,000 in 1949 profits are shown in every year through 1955 with the exception of a small loss in 1953 and a substantial loss in 1956. Respondent Original Tractor Cab Co. had profits in 1951, 1952 and 1954, the profits in 1952 exceeding by almost $10,000 the loss in 1949, and the profits in 1951 exceeding by almost $10,000 the loss in 1956. Also by 1956 there was no conspiracy in existence, since co-defendants had made settlement two years prior in December, 1954, and the objectionable group agreement had been cancelled as of November 15, 1952. A license was offered respondents January of 1951 and after settlement in the Government case in October, 1953, respondents were again offered a license as was the industry generally.

The only logical conclusion after viewing the above figures is that defendants' business was unaffected by any activities of petitioner or his licensees after 1949, but was subject solely to normal economic factors and business variables. Respondents conducted an illegal parasitic operation based on the appropriation and willful infringement of the Clapper patent and any loss that was sustained by respondents was caused solely by expenditures made voluntarily to conduct and support their illegal operation.

Why the Trial Court in this case was so lenient with respondents with respect to requirements for competent proof of damage was never understood, nor were the allowance of attorney's fees consistent with the damages actually sustained or even those assessed.

In *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 8 Cir., 194 F.2d 846, 858-859, the single damages awarded by the jury were $375,000.00. The District Court allowed a counsel fee of $150,000.00. The Court of Appeals for the Eighth Circuit reduced that amount to $100,000, which was about 26.6% of the single damage.

In *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 7 Cir., 190 F.2d 561, decided by the Court of Appeals for the Seventh Circuit, the single damages awarded by the District Court were, approximately, $432,000.00, and the counsel fee was $225,000.00. The Court of Appeals reduced the single damages to approximately $313,000.00, and the counsel fee to $75,000.00, or about 25% of the damages.

Paramount Film Distributing Corp. v. *Applebaum*, 5 Cir., 217 F.2d 101, 103, decided by the Court of Appeals for the Fifth Circuit, involved single damage of $150,000.00, with attorney's fees allowed in an amount of $40,000.00.

Thus it will be seen that it has been usual practice for the Courts to limit the attorney's fees to not substantially more than 25% of the single damage awarded, yet in the instant case the allowance of attorney's fees for the patent defense was in excess of the single damage award, and the allowance for attorney's fees for the antitrust action were almost as much as the single damage award.

Also, there is the significant circumstance that proofs in this case were previously made by the same counsel in *Mason City Tent & Awning Co.* v. *Clyde E. Clapper et al.*, 114 F. Supp. 754, Appendix Exhibit D, pages A115-A146. Although the District Court in this case refused to recognize it, the fact remains and can be readily determined by reading the decision in the Mason City case that the proofs, insofar as antitrust violation were concerned, were to a great extent the same. So, far from being confronted with unusual difficulties and problems due to the necessity of proving violation of the antitrust laws and the existence of a conspiracy, counsel's task was made exceptionally easy in this case, by virtue of the fact that those proofs had *already* been made in the Kansas City case and the issues had *already* been resolved therein. The defendants in the Mason City case were Clapper and the same corporate

licensees that were charged as being co-conspirators in the present case. The proofs that needed to be made here with respect to conspiracy and antitrust violation were the same proofs as were made in Kansas City. The attorney who made them in the Kansas City litigation is also principal counsel for the respondents here so, before presentation of his case, here, he already had the benefit of a "dry run" to test his theories and develop his presentation. Never was there a better example of litigation going to trial with the major work already done, with the proofs already tried and thoroughly tested at the expense of another client, with the evidence already at hand. Virtually all of the exhibits which defendants' counsel placed in evidence before this Court to establish conspiracy and antitrust violation (some 60 or 70 documents) had been exhibits in the Kansas City case and were, in effect, simply borrowed for use here. In addition, defendants availed themselves of the interrogatories in the Kansas City case, the pleadings therein and the rulings of Judge Ridge, not to mention the complete transcript of the testimony which Fred M. Roberts gave at the Kansas City trial.

To Judge Major's observation in *Milwaukee Towne* v. *Loew's Inc.*, *supra*, that the law "recognized no charge so easily made, so susceptible of proof by inference or otherwise" as the charge of conspiracy, we would add that if it is easy in an ordinary case, it certainly was made incomparably easier in the present instance, where it involved nothing more than going through the motions of duplicating what already had been done in Kansas City. Certainly, no unusual skill or competence was required; it was little more than a mechanical operation.

This indeed should have been a factor to be taken into consideration in determining what attorneys' fees were appropriate. *Bordonaro Bros. Theatres, Inc.* v. *Para-*

mount Pictures, Inc., et al., (D.C.N.Y., 1953) 113 F. Supp. 196. In the earlier trial referred to in the *Bordonaro* decision, attorneys' fees of $18,000 had been awarded. By fixing the amount at $4,500 on the second trial, the Court recognized that, even though counsel had to make proofs to establish continuance of the conspiracy, their services on the second occasion nonetheless were substantially less demanding, and merited only one-fourth of the attorneys' fee awarded in the previous case.

With this in mind, let it be noted that Judge Ridge allowed $5,000 as reasonable attorneys' fees in the Kansas City case, *Mason City Tent & Awning Co. et al. v. Clapper et al.*, 144 F. Supp. 754. If $5,000 represented the reasonableness of the services rendered by Mr. Swecker and his co-counsel in that litigation (and evidently it did, for they accepted it without any objection) it follows that here, where less work, less skill, less of everything was required, the true value of their services was substantially under $5,000.

Certainly it can be said that the allowance of attorneys' fees in the case at hand should represent but a very modest proportion of the $27,611.35 recovery, in view of the fact that substantially all of the work had previously been done in the Kansas City litigation. For that work defendant's principal counsel already has been paid once, out of the attorneys' fees allowed by Judge Ridge; to make an allowance here that would pay him a second time for the same work would be unconscionable.

Another flagrant error of the Trial Court in assessing the entire amount of attorneys' fees against petitioner for prosecution of the patent defense in this case is evident from the following facts:

(a) That patentee Flora and the three cross-defendants were co-conspirators with Clapper under

the Trial Court's interpretation from the institution of suit on April 14, 1950, until settlement on December 14, 1954.

(b) That petitioner Clapper was purged of any stigma of the alleged conspiracy by offer of license in January of 1951, and by the consent decree and offer of license at the termination of the Government suit in October of 1953,

(c) That the period from June 15, 1951 to May 10, 1954, was spent in the prosecution of the question of venue by respondents and cross-defendants during which time prosecution of the patent infringement phase of the case was dormant.

Petitioner also contends that the Trial Court's allowance of attorneys' fees against petitioner for the total amount expended by respondents for prosecution of their counterclaim for antitrust violation was clearly erroneous for the following reasons:

(a) That from the date of filing this suit on April 14, 1950, until June 15, 1951, when the venue question became the sole issue in the case, there were five alleged conspirators, so petitioner Clapper in any event could be liable only for one-fifth of any attorneys' fees that could be assessed for that period;

(b) In view of the fact that petitioner Clapper had purged himself on January 3, 1951, of any stigma of conspiracy by offer of license to defendants;

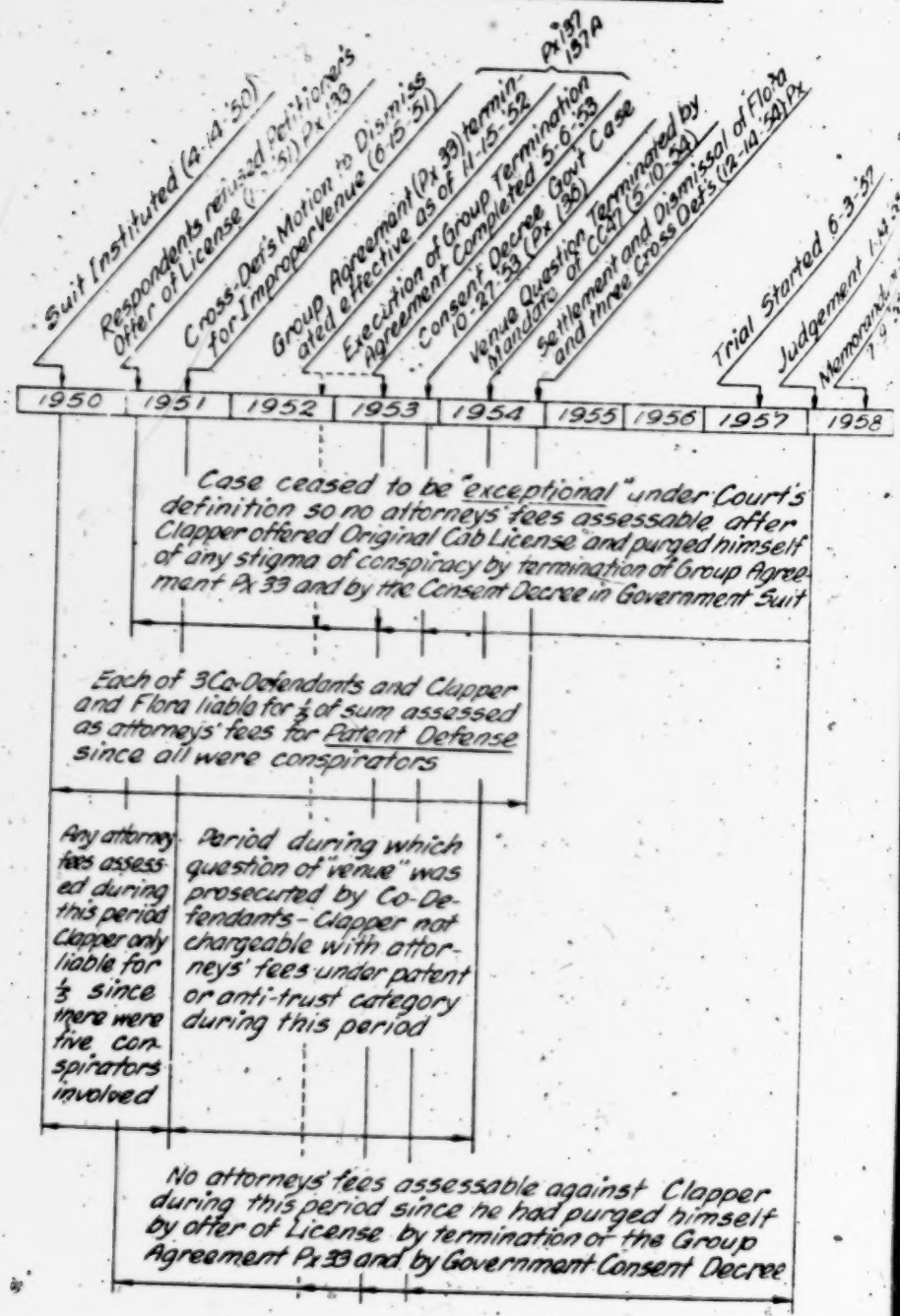
(c) Since petitioner Clapper had purged himself of any stigma of the alleged conspiracy by cancellation of the group agreement as of November 15,

1952, execution of which was completed on May 6, 1953, and by the consent decree in the Government suit October 27, 1953;

(d) When the period from June 15, 1951 to May 10, 1954, was spent in the prosecution of the question of venue by defendants and cross-defendants during which time prosecution of the antitrust phase of the case was dormant.

A chart showing graphically the significant dates and events bearing upon the errors above enumerated is bound in at this point.

CHART OF DATES AND EVENTS



PRAYER.

For the foregoing reasons your petitioner respectfully prays that a Writ of Certiorari be issued to the Court of Appeals for the Seventh Circuit to the end that this cause may be reviewed and determined by this Court: that the Judgment of the Court of Appeals for the Seventh Circuit be modified and that the petitioner be granted such other and further relief as may be proper.

Respectfully submitted,

THOMAS E. SCOFIELD,
1325 Rialto Building,
Kansas City, Missouri,
Attorney for Petitioner.

EXHIBIT A.

Clyde E. CLAPPER, Plaintiff,

v.

ORIGINAL TRACTOR CAB COMPANY, Incorporated, and Stanley Williams, Defendants.

Civ. No. 2255.

United States District Court
S. D. Indiana,
Indianapolis Division.

Findings of Fact and Conclusions of Law
Jan. 13, 1958.

Correcting Entry Jan. 14, 1958.

Memorandum July 9, 1958.

Action for patent infringement in which defendants counterclaimed for damages on ground of antitrust violations. The District Court, Steckler, Chief Judge, held that patent respecting tractor covers for deflecting heat from engine of tractor around operator was invalid because of anticipation in the art, and agreement by which it was attempted to monopolize, by combining of noncompeting patents in a single agreement by competitors which gave to parties to agreement veto power over patent rights that were not referable to individual businesses, or license granted, constituted violation of antitrust laws for which defendants were entitled to damages, and on motion with respect to bill of costs, costs were allowed prevailing defendant as disclosed in opinion.

165 F. Supp. 565

Judgment for defendant.

Thomas E. Scofield, Kansas City, Mo., Lockwood, Gault, Woodard & Smith, by Harold R. Woodard, Indianapolis, Ind., for plaintiff.

J. Preston Swecker, Washington, D. C., Kenneth I. Earnest, Rushville, Ind., Linder & Linder by John F. Linder, Indianapolis, Ind., for defendants.

The above entitled cause came on regularly for trial, and the court having duly considered the evidence, together with the post-trial briefs of the parties, the proposed findings of fact and conclusions of law, and the oral argument had thereon, and the court being fully advised in the premises, now makes its findings of fact and conclusions of law by adopting substantially the proposed findings of fact and conclusions of law as submitted by the defendants, with the exception however, of certain amendments and deletions as made by the court in order to more accurately reflect the views of the court in regard to the issues and the evidence pertaining thereto. The court's findings of fact and conclusions of law are therefore as follows:

Findings of Fact

1. Plaintiff, Clyde E. Clapper, is a resident of near Blue Springs, Missouri.

2. Defendant, Stanley Williams, is a resident of near Arlington, in the County of Rush, State of Indiana.

3. Defendant, Original Tractor Cab Company, Incorporated, is a corporation organized and existing under the laws of the State of Indiana and having its principal place of business at Arlington, Indiana.

4. Plaintiff filed this action under the Patent Laws of the United States, U. S. Code, Title 35, Section 281, to

enjoin the defendants from infringing patent No. 2,452,834, granted to the plaintiff on November 2, 1948.

5. The defendant, Original Tractor Cab Company, Incorporated, in answer to the complaint, included a counterclaim for damages claimed to have been caused by the plaintiff and others as a result of violation of the antitrust laws of the United States, under U. S. Code, Title 15, Section 15.

6. Thereafter, the plaintiff filed an amended complaint seeking (1) a declaratory judgment that the defendants were estopped from denying the validity and infringement of the plaintiff's patent and further that the defendants were estopped from charging a violation of the antitrust laws; (2) claiming an infringement of the plaintiff's patent and unfair competition; (3) that the defendants have, for the purpose of deceiving the public, falsely marked articles of manufacture with the patent number of the plaintiff's patent; (4) that the defendants have breached an agreement entered into with the plaintiff; and (5) that the defendants have been unjustly enriched, which latter was dismissed voluntarily by the plaintiff prior to trial.

7. The court has jurisdiction of the parties and of the causes of action presented.

8. All of the causes of action presented by the pleadings between plaintiff and defendants were presented to the court in a trial which consumed twelve full days, and all evidence presented by the parties with respect to all of such issues has been received by the court.

9. Thereafter, briefs were filed on behalf of the plaintiff and defendants, together with proposed findings of fact and conclusions of law. After the post-trial briefs and proposed findings of fact and conclusions of law were

filed, the proposed findings of fact and conclusions of law were subjected to oral argument for the benefit of the court.

10. In his briefs, the plaintiff has abandoned the causes of action for unfair competition and false patent marking, and the amended complaint will be dismissed as to these causes of action.

11. In 1945, the plaintiff and one Lee Flora, of Danville, Illinois, separately claimed to have made inventions in tractor covers for deflecting the heat from the engine of the tractor around the operator, and each filed an application for a patent thereon. In 1946, one Michael A. Halligan, of Fort Dodge, Iowa, claiming to have made a like invention, filed an application for a patent thereon.

12. During the pendency of these three patent applications, the Patent Office, recognizing that they claimed substantially the same invention, declared an interference between all three of them, for the purpose of determining priority of invention as to said three patent applicants. It also declared a separate interference between the Flora and Halligan applications on an auxiliary feature of that tractor cover.

13. While his application for patent was pending, Clapper ha granted an exclusive license to Bearing Distributors Company to manufacture and sell the tractor cover included in his patent application and the patent to be granted thereon. Later that company's corporate name was changed to Comfort Equipment Company.

14. Flora had granted an exclusive license under his patent application to the Cabette Company, of Danville, Illinois, to manufacture and sell the tractor cover included in his application and the patent to be granted thereon.

15. Halligan likewise had granted an exclusive license to the Fort Dodge Tent & Awning Company to manufacture and sell the tractor cover included in his patent application and the patent to be granted thereon. Later that company's corporate name was changed to Burch Manufacturing Company.

16. After licenses were granted to the above corporations, Comfort began manufacturing and selling tractor covers in 1945 and Burch and Cabette began like operations in 1946, sales being made largely through distributors located throughout substantial portions of the United States.

17. In April, 1948, after the declaration of the aforesaid patent interferences, representatives of the abovenamed licensees and the three named inventors and their respective attorneys met in Chicago, Illinois, in an effort to settle their differences with respect to priority of invention. At the outset of said meeting and prior to disclosures between themselves of the respective dates of invention, it was agreed by all of the parties there present, or represented by others, that each of the corporate licensees under the then pending patent applications would have a right to a license under each patent application then pending and under any letters patent that might be granted thereon, upon the same terms as granted to the others.

18. Thereafter, at said meeting some evidence of priority of invention was adduced and discussed by the parties, but the discussion was concerned more particularly with the question of royalties to be paid by the respective licensees to the respective patent applicants. At the conclusion of the meeting, although specific agreement was not reached thereon, by reason of the earlier filing date of his patent application, it was generally understood

that Clapper should have priority of invention to the basic unit of a tractor heat deflector; that Flora, who was second in point of time in filing his patent application, should have priority as to the part of the tractor cover that surrounds the operator; and that if Halligan had any priority of claim with respect to an invention, it was minimum.

19. The parties were unable to settle at that meeting the question of priority of invention and the amount of royalty to be paid by the respective licensees, and it was agreed that another meeting be held by the interested parties or their representatives to formulate specific agreements regarding the question of royalties to be paid by the respective licensees to the several patent applicants. Later, two such meetings were held in St. Louis, Missouri, at which the interested parties or their representatives and their attorneys attended. At these meetings in St. Louis, Missouri, various topics were discussed, such as the amount of royalties to be paid, the establishment of a litigation fund, costs of manufacture and the selling price per unit of tractor covers and other related subjects.

20. From the conferences had in said meetings in St. Louis, Missouri, and correspondence later passing between the interested parties, a final meeting was agreed to be held at Des Moines, Iowa, when the License Agreement of August 3-4, 1948, was formally executed by or on behalf of said three aforesaid inventors and their several respective licensees.

21. At that same meeting in August 3-4, 1948, "Priority Award Agreements" were consummated by the three inventors, whereby Clapper was awarded priority of invention on the counts involved in the three-way interference, and Flora was awarded priority of invention on the counts involved in the two-way interference. There-

after, on November 2, 1948, Clapper was granted Letters Patent No. 2,452,834; and on February 15, 1949, Flora was granted Letters Patent No. 2,461,974. No patent was granted on the Halligan application.

22. By the terms of the License Agreement executed at Des Moines, Iowa, on August 3-4, 1948, the priority of Clapper and Flora to their respective inventions was recognized and agreed upon. Cabette, Fort Dodge and Bearing were each granted a separate license to manufacture and to sell heating units embodying the Flora and Clapper inventions, subject to the following conditions, among others: (1) that the licensees manufacture such heating units "at their respective addresses and in no other place or places except upon written consent" of the owner of the respective patents; (2) that the licensees pay Clapper $1 "as a royalty fee on each and every unit sold and shipped by them" and pay a proportionate royalty on parts, including specifically a royalty of 15¢ on "windshields when sold separately from completed unit"; (3) that the licensees pay Flora 25¢ on each and every unit sold by them, and also a "proportionate royalty" on parts, the same as Clapper; (4) that if any party to the Agreement made, or became the owner of any "improvements" in said heating units," then Cabette, Fort Dodge and Bearing could manufacture and sell the improvements without paying any further royalty, except as set forth in paragraph 13 of the Agreement; (5) that Flora and Clapper would not grant any licenses under any patent that may be issued to them, respectively, "or any other patents that might fall within (the) license agreement, without first obtaining the written consent thereto of the remaining parties to (the) Agreement," and each of the licensees agreed not to grant any sub-licenses or any licenses on "any other patent that might fall within (the)

License Agreement, without * * * the consent thereto of the remaining parties"; (6) Flora and Halligan agreed to "file applications for Canadian patents" on the subject matter of their respective United States patent applications, and Clapper and Flora granted licenses and the right to "manufacture and sell" heating units under their respective Canadian patent applications "then on file or to be filed"; (7) that if any patent was issued on the "Halligan application" or "any improvement made by Halligan relative to the subject matter of his application" then Bearing and Cabette would have an option "to take a license under such patent" and to pay royalty therefor on equal terms with Fort Dodge; (8) Sections 13, 14 and 15 of said license agreement read as follows:

> "13. In the event any of the claims included in patents that may be issued on said Flora, Clapper or Halligan application, or any patents issued covering any improvements thereon, are infringed or in the event any party to this agreement is sued for infringement for the manufacture of heating units under said patents, then any party to this agreement having knowledge of such infringement or any party to this agreement who is sued for infringement shall send written notice thereof to the remaining parties and within a reasonable time thereafter, not to exceed twenty days, all of the parties hereto agreed to discuss said infringements for the purpose of arriving at a mutually agreed upon procedure for their disposition.
>
> "14. To prosecute infringers and defend against infringement, the parties hereto agree to set up a litigation fund of $8,000.00 in the following manner: coincident with the execution of this agreement, Clapper shall pay into the said fund $3,000.00 and Cab-Ette, Fort Dodge and Bearing the sums of $1,000.00 each; that Cab-Ette, Fort Dodge and Bearing shall pay into said fund the additional sum of 5¢ on each

heating unit sold by them, respectively, from and after the 1st day of August, 1948, and said Clapper shall pay into said fund the sum of 5¢ for each $1.00 royalty by him received from and after the 1st day of August, 1948, until the funds amount to $8,000.00. That if at any time during the life of this agreement said fund shall be depleted to the sum of $6,000.00, then in any such event, the said parties hereto shall again contribute to said fund at the rate of 5¢ per unit as hereinabove in this paragraph provided, until said fund shall again amount to the sum of $8,000.00. The monies to be paid into said fund as above provided shall be paid to Clapper, who shall deposit and hold the same in trust in the Commerce Trust Company of Kansas City, Missouri, for the prosecution of infringers and the defending against infringement of any patents because of the manufacture, by Cab-Ette, Fort Dodge, or Bearing of heating units under the above recited patent applications, or patents issuing therefor, or any future patents that may fall within the terms of this agreement. That said funds are to be used for the prosecution of infringements of any of said patents only upon the approval of a majority of the parties to this agreement. That said fund shall also be used to defray the expense that may be necessarily incurred in the investigation of claimed infringements and the necessary correspondence, negotiations and the giving of legal notice of infringement to infringers. That in the event any of the parties to this agreement shall claim an infringement materially affecting their business and shall have given notice thereof to the other parties hereto as provided in paragraph numbered 13 hereof, and a majority of the parties hereto agree that such claimed infringement should be prosecuted, then such prosecution shall be instituted within ninety days, but if a majority of the parties hereto shall fail to give their approval to the prosecution of such an infringement within a period of ninety days after the giving of such notice, then in that event, such party hereto claiming to be materially affected as aforesaid shall

have the right and privilege at its own expense to prosecute such infringement without any claim to any of the monies in the said fund in this paragraph provided for, unless such prosecution shall have been finally resolved in favor of the complainant, in which event said complainant shall be entitled to be reimbursed from said fund for their expense incurred in the prosecution of such infringement. That in the event a majority of the parties agree to the prosecution of any infringement, or to undertake the defense of any claimed infringement by any of the parties hereto, that in any such event, the owner of the patent being infringed shall, and with the aid and advice of the remaining parties hereto if he so chooses, select and engage required counsel. That Clapper shall render unto Cab-Ette, Fort Dodge, and Bearing upon request an itemized statement of all sums, if any, withdrawn from said fund accompanied by a copy of the bank statement thereof. That the liability of Flora, Clapper, and Halligan to prosecute infringements or to defend against infringements shall be limited to the monies in said fund in this numbered paragraph provided for. Upon the termination of this agreement by expiration of the patents issued to Flora and Clapper on U.S. applications 617,049 and 583,345, respectively, or otherwise, or by the mutual consent of the parties, said fund shall be liquidated by dividing among the parties the monies in said fund in proportion to the amounts paid in by said parties as herein provided for.

"15. That in the event a patent shall be issued for improvements upon said heating units to persons other than parties to this agreement, then in such event, it is agreed that the parties hereto shall call a meeting and act as a unit in the negotiatio for the use of such improvement, if desired, so as to make the same mutually available and on the same terms to all parties to this agreement, but that if the majority of the parties to the agreement determine not to contract for such improvement, then the par-

ties to this agreement are privileged to contract therefor individually or collectively."

(9) said agreement was "based not only on the patents to be issued on said Clapper or Flora application which (were) the "subject matter of (said) agreement, but also upon those issued upon any renewals, continuations, divisions of, or substitutes for, said applications, and also on any reissues or extensions of said, patent or patents"; and (10) that unless otherwise terminated, the licenses granted were to "extend to the latest expiration date of any patent issued on said Clapper and Flora applications."

23. Under the original license that Comfort had from Clapper; Cab-Ette had from Flora; and Burch had from Halligan; and the license agreement executed by plaintiff on August 3-4, 1948, the licensees, Comfort, Cab-Ette and Burch, built up substantial businesses, each doing several million dollars of business in interstate commerce, manufacturing and selling tractor heating units during the time referred to herein. Each had numerous distributors in this country and Canada. Their collective sales value of tractor covers ranged from $200,000 to over a million dollars a year. Royalties paid to the plaintiff have amounted to over five hundred thousand dollars.

24. Adhering to the agreement of August 3-4, 1948, the licensees and Clapper set up a "Litigation Fund" as therein provided, for the purpose of defraying the expense of investigating and prosecuting infringers and defending against infringements of the Clapper and Flora patents. Said fund continued in existence from 1948 and the parties proceeded to use and control the same jointly as provided in said license agreement until on or about May 6, 1953. On that date the "Litigation Fund" was disbursed to Clapper and Flora, proportionately and the agreement of August 3-4, 1948, was terminated by the execution of

a "Termination Agreement" which mainly resulted from a civil anti-trust action instituted against the licensees and Flora and Cab-Ette by the United States in the United States District Court, Western District of Missouri, Western Division, entitled United States v. Bearing Distributors Company, 11 F.R.D. 591; 18 F.R.D. 228.

25. Thereafter, separate non-exclusive licenses were granted by the patentees, Clapper and Flora, to Burch, Comfort and Cabette, under which these three corporations conducted their business operations in tractor covers, and any and all interim effects of the Agreement of August 3-4, 1948, thereafter ceased to exist on May 6, 1953.

26. On November 24, 1948, plaintiff served notice on the defendant, Original, of infringement of the aforesaid Clapper patent, No. 2,452,834. However, no action was taken immediately against the said defendant.

27. During all of the times herein mentioned, the plaintiff was represented by Mr. Fred M. Roberts, an attorney with offices in Kansas City, Missouri. After consummation of the License Agreement of August 3-4, 1948, and establishment of the litigation fund provided for therein, Roberts, under instructions from Clapper and with full knowedge and understanding of the other parties to the Agreement of August 3-4, 1948, caused the notices of infringement to be sent to the defendant, Original, and to all of the known distributors who were selling tractor covers manufactured by the defendant. Notices of those and other claimed infringements were sent to Roberts by the plaintiff and by the licensees and from various other sources. When knowledge of a claimed infringement was made known to Roberts, he caused infringement notices to be served on the alleged infringers. Copies of said notices were sent to the plaintiff and to the licensees and they were generally informed by Roberts of the giving of said

notices of infringement and were consulted from time to time with respect thereto.

28. In August, 1949, a second notice of infringement was sent by Mr. Fred M. Roberts, as attorney for the plaintiff, Clapper, to the defendant, Original, and a number of letters were sent by Roberts to the distributors for the defendant, informing said distributors that the tractor covers manufactured by the defendant, Original, were infringements of Clapper's Letters Patent, whereby the sale thereof by such distributors constituted an infringement, and subjected the said distributors to infringement actions by the said patentee.

29. As a consequence of such infringement notices, the defendant, Original, did cease for a time the manufacture and sale of tractor covers, and also some of the distributors thus notified of infringement also ceased selling tractor covers manufactured by the said defendant and began the sale and distribution of tractor covers manufactured by Comfort Equipment Company; whereby the sale of the tractor covers by the said defendant to the public were thereby directly curtailed and limited.

30. Clapper and Roberts were obligated under Section 13 of the Agreement of August 3-4, 1948 to give notice and to take action against claimed infringement of Clapper's Letters Patent within ninety days after notice thereof was received from the licensees or from any other source, and generally did so by serving notices of infringement. Clapper, as trustee of the litigation fund, built by himself and the licensees, expended $15,288.24 from the litigation fund with the approval of Flora and the licensees, to defray the costs incurred in the giving of infringement notices and the prosecution of infringement actions, including the one here involved instituted against the defendants.

31. After the giving of notice of infringement by the plaintiff to the defendant, Original, the defendants sought a license under the Clapper patent, but all such requests were denied by the plaintiff because of his obligations to Flora and the licensees, parties to the Agreement of August 3-4, 1948.

32. After the notices of infringement were sent by Roberts in August, 1949, to the defendant, Original, and to its distributors as aforesaid, the defendants were invited to a meeting held in Chicago, Illinois, on September 12, 1949, with the plaintiff, together with Flora and the several licensees under said License Agreement, their representatives and attorneys, for the purpose of discussing the license requested.

33. At the meeting on September 12, 1949, the defendant, Williams, sought to persuade the plaintiff, together with Flora, and representatives of and attorneys for their several licensees, that a license should be granted to the defendant, Original, but such request for a license was rejected by those present acting in concert.

34. The parties to the Agreement of August 3-4, 1948, including the plaintiff, acting through Roberts and through the spokesman for the group at the meeting on September 12, 1949, concertedly acted to stop the defendants from manufacturing and selling tractor covers in infringement of the Clapper patent. The full extent of all economic duress thus imposed by the plaintiff together with Flora and the licensees, the other parties to the said Agreement, in respect to that matter through the giving of notices to the defendant and to its distributors, was that if such claimed infringement was not abated, patent infringement proceedings were imminent.

35. The spokesman for the several parties to the Agreement of August 3-4, 1948, upon rejecting the appli-

cation of the defendants for a license under the Clapper patent, in the meeting on September 12, 1949, informed the defendants that the defendant, Original, would be given a limited period of time within which to dispose of its stock of tractor covers then in course of manufacture and that if the defendants then ceased the manufacture of tractor covers, no action for patent infringement would be instituted. The evidence does not establish that an agreement was reached between the plaintiff and defendants in that meeting in Chicago on September 12, 1949, or subsequently. Any proposals made to the defendants in that meeting were in furtherance of a conspiracy in violation of antitrust laws, with respect to which the court will elaborate further in subsequent findings herein. Plaintiff has alleged and relies upon the theory that a contract was entered into between the defendants and the several parties to the Agreement of August 3-4, 1948, and that he, plaintiff Clapper, has been damaged as a result of the breach of said contract on the part of the defendants. There is no evidence in the record of damages to the plaintiff flowing from the alleged breach, even if it were assumed that an agreement was reached, which the court does not find.

36. Thereafter, the defendants entered into a working arrangement with Cabette, formed for the use of the Original facilities to manufacture parts of tractor covers for Cabette, which working arrangement became effective the latter part of October, 1949. A proposed contract to formalize the working arrangement was reduced to a writing dated November 4, 1949. Before the execution thereof by both parties, disagreement arose, and the proposed contract was not executed. The working arrangement was terminated by mutual consent. A proposed settlement contract dated November 23, 1949, was prepared. Before the

execution by both parties, a controversy arose, and the contract was unexecuted by both parties.

37. The defendants prior to the filing of this action by the plaintiff had no knowledge of the terms and provisions of the License Agreement of August 3-4, 1948, except with respect to the place of manufacture of the tractor covers with the permission of Clapper.

38. The defendants discontinued the manufacture and sale of the Original products and entered into a working arrangement with Cabette. This arrangement was made in order to afford Cabette the working facilities of Original whereby Original could manufacture parts for Cabette, and at the same time, it was a means of keeping Original in operation.

39. During the working arrangement between Cabette and the defendants, the defendants notified the plaintiff that they were discontinuing the manufacture and sale of tractor covers in accordance with the direction by the spokesman for the group at the meeting in Chicago, as aforesaid, on September 12, 1949, which notice was retracted, however, after the discontinuance of the working arrangement with Cabette in November, 1949.

40. During the working arrangement with Cabette, the defendants operated only as suppliers for Cabette by direction of the latter and did not thereby become licensees under the Clapper patent nor parties to the conspiracy whereby the defendants are not estopped from contesting the validity of the Clapper patent nor from claiming damages for violation of the antitrust laws, according to the first cause of action of the amended complaint.

41. Thereafter, upon the insistence of the licensee, Comfort, a meeting of the parties to the License Agreement of August 3-4, 1948, was held early in the year 195[illegible], to

determine what course of action should be followed with respect to the claimed infringement by the defendants; and subsequently, in accordance with an understanding reached by the parties to the Agreement of August 3-4, 1948, at that meeting, this action was instituted in April, 1950, claiming infringement of the Clapper and Flora patents. Thereafter, this action was dismissed as to the Flora patent.

42. The Clapper patent application was filed March 17, 1945, on which patent No. 2,452,834 was granted on November 2, 1948.

43. This patent disclosed a conventional farm tractor, indicated generally at 10 in Fig. 1, with a rear deflector member 44 (Fig. 1) extending over the superstructure 26 of the tractor and down along opposite sides of the operator's station at the seat 30. The rear open side of the deflector 44 is supported by a bow 36 (Fig. 7), adapted to be mounted on the rear axle housing 20 of the tractor and extending upward in front of the operator on the seat 30. A separate front deflector member 88 extends on opposite sides of the engine 22 of the tractor and down beneath the bottom of the engine as an extension of the deflector, so as to increase the supply of heat to the operator when needed. This deflector 88 is removable for the purpose described in the patent of varying the amount of heat to be supplied to the operator (see column 3, lines 55-56). The Clapper hot air deflector takes advantage of the known principle that the fan of the tractor would blow air over the engine during operation and be heated thereby, which heated air is then channeled back to the region of the operator.

44. All of the claims of the patent define the combination of the tractor 10, deflector 44 and bow 36. None of the claims define a hot air deflector comprising just the deflector and bow. In view of the limitations of the statute

(U.S.Code, Title 35, Section 112), if a patentable invention is to be found, it must be in the combination of the parts referred to comprising the tractor, deflector and bow.

45. Some of the claims in suit include the detachable front deflector 88 which is removable to adjust the amount of air supplied to the operator, and others include the windshield 72 which is detachably mounted on the bow in front of the operator. These are parts of the deflector structure but do not affect materially the combination claimed.

46. An examination of the file wrapper of the application for the Clapper patent reveals that the examiner called attention to a defect in the application as filed, that such application did not disclose

> "a full description of the continuous passage through which warm air may flow from the engine to reach the seat area."

The application was thereafter amended by inserting a description of the passageway 23 and the application of that numeral 23 to the drawings, but the additional disclosure thus incorporated in the application constituted new matter which was not a part of the application as filed. Consequently, no reliance can be placed, in the claim for patentability of the combination, on the parts that channel the heat of the engine back to the operator.

47. Furthermore, it was shown by the evidence that many tractors have walls between the engine and the operator. In some instances it is necessary to use blocks or brackets to hold the canvas off away from various parts of the structure so as to allow channeling of the heat from the engine to the operator. There was no disclosure of such provisions needed for a practical application of this heat deflector, without which the public could not

practice the invention as required for a complete disclosure, according to Section 112 of the Patent Law (U.S.Code, Title 35).

48. Beginning in the early days of the automobile, it has been conventional practice to channel the heat from the engine to the region of the operator. Examples of that principle are found in Standish, No. 1,287,495, and in Weiland, No. 1,988,875, as applied to a tractor.

49. Several of the patents disclose the application of a canopy or cowl section to a vehicle, such, for example, as White, No. 1,020,336, Lorton, No. 1,083,108, Nobel British No. 2641/05, Carew-Gibson, British No. 23,286/05, and Winet, Swiss No. 112,135. Disregarding the claim of channeling the heat from the engine through the deflector or cowl section to the operator, as we must, since this was not disclosed in the Clapper patent application as filed, the full combination in a motor vehicle of an engine, cowl section and frame or supporting means, is found in all of these patents.

50. Evidence was submitted also of the manufacture and sale of heat deflectors for tractors by the Colorado Tent & Awning Company and the Denver Tent & Awning Company, both located in Denver, Colorado, by the Duluth Tent & Awning Company, Duluth, Minnesota, and by Sears, Roebuck & Company, several years prior to the date when Clapper claims to have made his device, and more than a year prior to the filing of his patent application.

51. Contemporaneous records were produced, especially of the Colorado Tent & Awning Company, disclosing not only the use of a canvas deflector and metal bow or frame for supporting the same on the tractor, but also by photograph and description contained in advertising

material, showing clearly the use of substantially the same structure as incorporated in the Clapper patent and for the same purpose claimed here, namely, to channel the heat of the engine back to the driver of the vehicle. This material fully supports the claimed anticipation of the Clapper heat deflector, as prior knowledge, prior public use or prior sale, under the patent statute.

52. Substantially the same form of tractor cover as made by Colorado Tent Company, was included also in the proofs of manufacture and sale (thereof) by Denver Tent & Awning Company and by Duluth Tent & Awning Company. The proofs as to all of these confirm that such tractor covers, with a metal bow or frame for supporting the same on the tractor, were being made and sold as early as 1941 by these several companies and that they had the effect, when applied to the tractors, of channeling the heat of the engine back to the operator. For the most part, they were sold for Caterpillar type of tractors, but the Clapper patent makes no distinction as to the type of tractor. All of these tractor covers also included side panels for embracing opposite sides of the engine and connected with the cowl section to increase the quantity of heat supplied to the operator where needed.

53. In 1938, Sears, Roebuck & Company started the sale of a tractor cover which was termed a "windshield" and which comprised a canvas cowl member or deflector substantially like that shown in the Clapper patent and also supported on a tractor by a metal bow, substantially identical with that shown in the Clapper patent. The evidence shows that this had the effect of channeling the heat of the engine back to the region of the operator and that it was sold for several years, as long as Sears, Roebuck & Company were selling the Graham-Bradley tractors, all long prior to the date when Clapper claims to have con-

ceived of his idea, and more than a year prior to the date of his patent application (U.S. Code, Title 35, Section 102).

[1] 54. The evidence shows, and the Court so finds, that the construction of a heat deflector for channeling the heat of the engine back to the operator of a tractor, and mounting it by a bow or metal frame on the tractor, would have been obvious to a person skilled in the art, at a date when Clapper claims to have made his invention.

55. The fact that almost identical devices were conceived by the several patent applicants, Clapper, Flora and Halligan, at about the same time, and apparently without knowledge of the developments of each other, is corroborative of the inescapable conclusion that this was an obvious adaptation, and that it did not amount to a patentable invention.

56. In any event, Clapper's contribution clearly lacked patentable merit as a combination. Every element was old in the prior art, the tractor, the heat deflector or cowl section of canvas, and the metal bow or frame. The manner of use of these in combination was what would have been expected in putting them together in the manner set forth in the Clapper patent. This is the type of device which is unpatentable as a combination, because the combination was not new nor the elements individually.

[2] 57. Since the Clapper patent is invalid, as indicated above, the question of infringement is moot. There can be no infringement of an invalid patent.

[3] 58. Moreover, this Clapper patent has been used as a basis for an agreement in restraint of trade in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Such misuse of patent rights bars any recovery for patent infringement.

|4| 59. By the Agreement of August 3-4, 1948, the patentees, Clapper and Flora, granted a non-exclusive and non-transferable license to Comfort, Cabette and Burch to manufacture and sell tractor covers. The limitations imposed on the licensees by said Agreement, that the licensees would manufacture the inventions "at their respective * * * named addresses and in no other place or places"; and that no other license would be granted "without obtaining the written consent thereto of the remaining parties to the Agreement"; that if a license so granted was terminated, as provided in Paragraph 8 thereof, Flora or Clapper, respectively, shall be at liberty to license other licensees; that the parties would "mutually agree upon procedure for the disposition" of infringement suits; and that the parties set up a "litigation fund" to be used for that purpose, all are elements of illegality when used for an illegal purpose, as they were.

|5| 60. An agreement by a patentee which gives a non-exclusive licensee a veto power in the selection of other licensees is invalid according to Sherman Act standards, Sections 1 and 2.

|6| 61. The Agreement is also violative of Section 2 of the Act, in that it manifests an attempt to monopolize by the combining of non-competing patents in the single agreement by competitors and gives to the parties to the agreement veto power over patent rights that are not referable to their individual businesses, the patents or licenses granted, and this is true even though the licensees may have continued to compete with each other in the manufacture and sale of tractor covers after the execution thereof. They were jointly given an exclusive market and control thereover by the terms of said Agreement, and not singularly as a consequence of patent privileges acquired.

62. By Section 13 of the Agreement the parties agreed to and the evidence establishes that they did act jointly in respect to "infringements" of the letters patent in question, and "mutually agree upon procedure for their disposition." In Section 14, Clapper and the licensees set up a "Litigation Fund" to be used for the prosecution of infringements of both said letters patent, upon approval of a majority of the parties to the agreement, and the evidence is that said fund was actually used by them for that purpose. The clear intent of the parties, gleaned from the verbiage contained in paragraphs 13 and 14, supra, and from the evidence herein was giving to each party thereto a separate and collective right to bring and control infringement actions, when no such right or power legally existed in the licensees, or opposite patentee, so to do under patent law; that they jointly and cooperatively intended to and did unite in the prosecution, and use of the "Litigation Fund" for that purpose. The action of the parties as revealed by the evidence is that they did, pursuant to the said agreement, join hands, through Roberts, in the giving of infringement notices to defendant and its dealers, and in so doing they intended to curtail and ultimately stop the manufacture and distribution of tractor covers by defendants, and sale thereof by defendants' distributors.

[7] 63. The evidence clearly establishes that the licensees were the major manufacturers of tractor covers and held a dominant position in that field of interstate trade and commerce, and that if the Agreement of August 4, 1948, was carried out by the parties, according to its terms, as it was, that the monopoly granted to said licensees gave them virtual control of that market and made it impossible for defendants to obtain any rights under the patents in issue, or legitimately enter the field of manufacturing and selling tractor covers. It is the fact

of combination and concert of action by the parties to do the very things that they claim they had a right to do under said agreement, collectively and jointly, that spells out unlawful use of patent monopoly by them, in violation of Sections 1 and 2 of the Sherman Act.

[8] 64. It is no defense of the Agreement of August 4, 1948, or for the giving of infringement notices and bringing of the infringement action as mentioned above, to say that Clapper and Flora had the right to grant separate licenses to defendants and that said patentees had the right under patent law to give notices of infringements of their respective patents, and to bring infringement actions. It is conceded that such are legal rights accruing to a patentee or his assign or assigns. But what may be legally done by a patentee, or his assign, singularly or collectively, is no criterion for the measurement of legality of the agreement of August 4, 1948, and what was actually done by the plaintiff and his licensees in furtherance thereof as shown by the evidence. What Clapper, or Flora, separately, might legally have done and what was done by them in concert of action with each other and with the licensees herein are two different matters. The fact that concert of action, violative of the Sherman Act, is accomplished by legal means, does not remove the terminal result thereof from the prohibitions of the Act.

[9-11] 65. A conspiracy or combination having as its object, or effect, a restraint of interstate trade and commerce, whether accomplished by legal or illegal means, falls within the ambit of Sections 1 and 2 of the Sherman Act and is condemned thereby. Patent rights give no protection from the prohibition of the Sherman Act, when they are asserted, controlled, or used in consequence of an agreement that is in restraint of interstate trade or commerce. Cf. United States v. New Wrinkle, Inc., 342 U.S.

371, 72 S.Ct. 350, 96 L.Ed. 417. When two individual patentees combine their patent monopolies and contract between themselves and with their licensees to secure mutual benefits for themselves and their licensees that are not given to them by the patent laws, and which agreement gives to the opposite patentee and the licensees a right of control over patent rights that may be asserted, and is used in restraint of interstate trade and commerce, the purpose and result of such an arrangement and conduct is clearly in violation of Sections 1 and 2 of the Sherman Act. Cf. United States v. United States Gypsum Company, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746; United States v. Line Material Co., 333 U.S. 287, 68 S.Ct. 550, 92 L.Ed. 701; and United States v. New Wrinkle, Inc., supra.

66. The evidence shows that the impact of this conspiracy on the defendants has been substantial, has caused a direct loss of customers, a shutdown in business, and it is inescapable as a conclusion from all of the evidence that it has caused a material reduction in the potential sales of the defendant, Original. However the evidence before the court upon which to estimate the loss of potential sales is such as to preclude the court from relying upon it, and only for that reason is the court not able to fix the damages suffered by the defendants for loss of potential sales in each of the years in question.

67. The evidence is that the defendant, Original, sustained damage as a direct result of the actions of the plaintiff in concert with others. The impact of that conspiracy resulted in damages to the business and property of the defendant, Original.

68. The evidence shows direct loss was suffered by the defendant, Original, in salaries, wages and other expenses of shutdown from August 22 to September 23, 1949.

in the total amount of $2,561.45. Defendant, Original, also claims an average cost of $116.43 per day for eleven days' stoppage of production from November 18 to December 1, 1949, following the termination of a working agreement with Cabette. This would amount to $1,280.73. The defendant, Original, also claims the sum of $3,830 for the loss it sustained as a result of the unsuccessful working arrangement it had with Cabette from the latter part of September to on or about November 23, 1949.

In regard to the working arrangement, the court finds the facts to be:

(1) that the arrangement was voluntarily brought about by the mutual desire of the officers of Cabette and Original;

(2) it was a business expedient for both parties;

(3) its termination came about through disagreement of the parties to the arrangement;

(4) there is not a preponderance of the evidence to indicate that the plaintiff Clapper and his licensees, through any conspiratorial act, caused the termination of the working arrangement.

Accordingly, defendant, Original, is not entitled to loss claimed for the eleven days' work stoppage and the claimed loss of $3,830 arising out of the unsuccessful working arrangement.

69. The evidence shows that the defendant, Original, had negotiated for financing for continued operation which had to be dropped entirely by the shutdown following the notices sent by the plaintiff in concert with others, in August, 1949, the cost of which to the defendant, Original, was $317.20, which it is entitled to recover.

70. The evidence shows that the defendant, Original, had expended for advertising the sum of $4,563.70, which

was rendered valueless by the forced shutdown in August, 1949, as a result of said notices of infringement sent to the defendant and to its distributors.

[12] 71. The evidence shows that the defendant, Original, has incurred in fees and expenses obligations for $28,244.31 in defense of the patent infringement action instituted by the plaintiff and Flora as a part of the conspiracy in violation of the antitrust laws. The court finds these legal fees and expenses to be reasonable for the services rendered by counsel for the defendant, Original, in the defense of the patent infringement litigation, and should be awarded to defendant's counsel for such services. Said sum, however, is not to be included as an element of damages in the antitrust action to be increased threefold, as defendants would have the court do. It is to be awarded counsel for the defendants by reason of their representing the successful parties in the patent infringement action, and by reason of the exceptional circumstances involved in the case concerning the validity of the patent and its use by the patentee and his licensees, all as found in these findings of fact.

[13] 72. The evidence shows that there has been a direct loss of sales by defendant, Original, to Farm Equipment Sales Co. and Stover-Winsted Co. as a consequence of the notices of infringement sent pursuant to the conspiracy created by the License Agreement of August 3-4, 1948. Defendant, Original, has vigorously contended and attempted to show that it also sustained loss of sales to Firestone Tire & Rubber Co. as a consequence of notices of infringement sent pursuant to the aforesaid conspiracy. In respect to the latter company, the court fails to find from the record sufficient evidence to support the defendants' claim of loss of sales to Firestone Tire & Rubber Co. by

reason of the notices of infringement sent pursuant to the conspiracy.

Following the time Stover-Winsted Co. and Farm Equipment Sales Co. stopped doing business with the defendant, Original, the evidence shows that during the years 1949 through the first eleven months of 1956, Farm Equipment Sales Co. purchased from Comfort Equipment Company 9,084 covers. Such purchases were as follows:

Farm Equipment Sales Co.

Year	Comfort Covers Purchased
1949	1,339
1950	1,452
1951	1,985
1952	1,494
1953	982
1954	732
1955	649
1956 (11 months)	451
	9,084

Following the time Stover-Winsted Co. stopped doing business with the defendant, Original, it made the following purchases of Comfort covers from Comfort Equipment Company:

Stover-Winsted Co.

Year	Comfort Covers Purchased
1949	1,410
1950	1,425
1951	2,361
1952 (Jan. thru May)	660
	5,856

The evidence shows that during said years the actual average net profit to defendant, Original, on the sale of half Cabs amounted to $1.35 per unit. Accordingly, the loss sustained by defendant, Original, in respect to the loss of sales to Farm Equipment Sales Co. amounted to $12,263.40, and the loss of sales to Stover-Winsted Company amounted to $7,905.60. Where there is certainty as to the fact of damage which is thus established, there may be uncertainty as to the amount of damages. It is reasonable to conclude that the defendant, Original, could have sold at least an equal number of tractor covers to Farm Equipment Sales Co. and Stover-Winsted Co. had said companies not ceased to do business with the defendant, Original, as a result of the notices of infringement sent to them pursuant to the conspiracy created by the License Agreement of August 3-4, 1948. Therefore the court finds that the defendant, Original, has been damaged by reason of the loss of sales to said companies in the total amount of $20,169.00.

73. The evidence shows that an estimate was made by the defendant, Williams, president of the defendant, Original Tractor Cab Co., Inc., as to the total number of tractor covers that could have been manufactured and sold by the said defendant, Original, but for the interference with the business of the defendant, Original, by the plaintiff, together with Flora and their licensees acting in concert. A very considerable amount of time and record was devoted to the explanation of the defendants' theory upon which the asserted right to recover for loss of potential sales is predicated. Briefly and generally, the theory of the defendant, Original, as explained by its president, Williams, and its accountant, Morgan, involved the process of taking the number of dealers the defendant, Original, had prior to the summer of 1949, at which time it changed its sales

methods from dealers over to distributors. Williams explained he was very careful in making his calculations in order to stay on the conservative side. In his survey of existing dealers, he found there were 901 dealers listed. But of the 901 listed dealers he could find only 684 cards showing actual sales to such dealers. Therefore in his calculations he used the figure of 684 dealer cards as the basis from which to test the average potential sales to the established dealers. Among the 684 dealers, he found that 336 had sent orders in and had purchased half/Cabs. The 336 dealers purchased 1,275 half Cabs. By taking the number of purchases of half/Cabs and relating them to the number of dealers who had actually purchased half/Cabs, he found that the company sales amounted to three and eighty hundredths half/Cabs per dealer. By relating the company sales of half/Cabs to all of its dealers, he found that the company's average sales of half/Cabs per dealer amounted to 1.86 half/Cabs.

After the establishment of the distributorships, Williams made a survey in order to determine the total number of dealers served by the distributors. It was found that the distributors serviced 17,450 dealers. Commencing with the year 1949, the first year defendant, Original, had distributors, and the first year of the impact of the conspiracy, the defendant, Original, estimated the sale of one unit to each dealer served by its distributors. Thus, it estimated its potential sales for the year 1949 at 17,450 units. Taking the year 1950 as the base year and applying the annual percentage growth in tractor population in the United States and applying such percentages of tractor population growth to the subsequent years to and including the year 1956, and by applying the estimated unit sales per dealer of 1.86, defendant thereby arrived at the respective total unit potential sales for the years 1950 through 1956. Page 8A of

Defendants' Exhibit JJJ sets forth the computation of the number of units of potential Original half/Cab sales as estimated by Williams and the accountant Morgan. They are as follows:

Computation of Number of Units of

Potential Original Half/Cab Sales

Year	Tractor Population	Per Cent of Base Year (1950)	Estimated Unit Sales per Dealer	Total Unit Potential Sales
1949	3,230,000	——	1	17,450
1950	3,442,000	100.00	1.86	32,457
1951	3,778,000	109.76		35,625*
1952	3,859,000	112.12		36,391*
1953	3,950,000	114.75		37,244*
1954	4,122,000	119.75		38,867*
1955	4,198,000	121.96		39,585*
1956	4,320,000	125.50		40,734*
				278,353

By eliminating what defendants' accountant determined to be abnormal operating expenses by reason of the impact of the conspiracy and the attendant litigation, the accountant arrived at an adjusted net unit profit per half/Cab. By further applying the estimated unit potential sales as estimated by Williams according to his estimated sales per dealer as related to tractor population growth, defendant established a different and higher net unit profit through

*Increased by percentage of tractor population over base year 1950.

the commensurate savings in overhead costs per unit due to the greater estimated production. By applying the greater net unit profit to the respective annual estimated potential sales, the accountant arrived at the total dollar profits which defendants claim could have been realized on potential sales except for the impact of the conspiracy for the period 1949-1956, which amounted to $1,364,200.10. From this was deducted the actual profit realized from sales of half Cabs as reflected by the accountant's pro-forma earnings statement adjusted to eliminate the abnormal effects of the conspiracy and litigation. The realized profits from actual sales of half Cabs during the period amounted to $79,996.17. Subtracting the realized profits from the total estimated profits, the accountant arrived at the figure of $1,284,203.93, which the defendants claim represents the total profits that could have been realized on the estimated potential sales except for the antitrust violations by plaintiff Clapper, together with Flora and their licensees.

[14] The court has spent numerous hours analyzing and weighing the defendants' evidence in regard to the damages sustained, and although it is convinced, even beyond a reasonable doubt, that the defendant, Original Tractor Cab Co., Inc., has been damaged as a result of the impact of the conspiracy of the plaintiff Clapper, and Flora and their licensees, the court is firmly of the opinion that the Williams-Morgan theory of computing the estimated potential sales is unrealistic and is based upon assumptions and conclusions which would lead the court into too much speculation and conjecture if reliance were to be placed upon it. For example, in order to rely upon the theory, it must be assumed that each of the distributors and the dealers included in Williams' estimate would continuously and consistently handle and sell the Original

product, and that they would do so throughout the years involved. As a matter of fact, the record discloses that Firestone Tire & Rubber Co., whose stores were included among the 17,450 dealers, completely discontinued the sale of tractor cabs either in the year 1952 or 1953. Likewise, in order to rely upon the Williams-Morgan theory, it must be assumed that all of the dealers operate in states having climatic conditions wherein tractor covers would have sales potential. Further, it must be assumed that the sales of the defendant, Original, would consistently increase annually and that there would be no peaks and valleys in its annual sales. The evidence in the case indicates that this was not true in the case of any of the defendant, Original's, competitors who were engaged in the tractor cover business in each of the years here involved. In short, the formula upon which the defendant, Original, would have the court find its loss of profits is so fraught with pitfalls as to render it completely unreliable as an aid to the court in estimating reasonably the damages defendant, Original, has sustained. The court must have before it such facts and circumstances, or comparisons, for example, as to enable it to make an estimate of damage based upon judgment and not upon conjecture or guesswork. The evidence as a whole is not sufficient from which to draw a reasonable inference to support the conclusion, that except for the interference with the business of the defendant, Original, by the plaintiff and Flora and their licensees, the defendant, Original, could have sold the number of tractor covers indicated by the estimate of potential sales with the resultant profit claimed thereon.

[15] 74. The losses heretofore stated resulted in damage to the business and property of the defendant, Original, as a consequence of the illegal conspiracy of the plaintiff, Clapper, and Flora and their licensees acting in

concert. For such damage, defendant, Original, is entitled to recover the following amounts of compensatory damages:

(1)	Costs resulting from forced stoppage of production, from August 22, 1949 through September 23, 1949	$ 2,561.45
(2)	Expenses incurred in finance negotiations	317.20
(3)	Advertising costs rendered useless by reason of forced work stoppage	4,563.70
(4)	Loss of potential sales to Farm Equipment Sales Co. for the years 1949 through the first eleven months of 1956	12,263.40
(5)	Loss of potential sales to Stover-Winsted Co. for the years 1949 through the first five months of 1952	7,905.60
	Total	$27,611.35

75. The licensees under the Agreement of August 3-4, 1948, were added to this action as cross-defendants. Thereafter, the counterclaim was dismissed as to said licensees and Flora and the defendants entered into covenants not to sue upon payment by those parties to the defendants the amount of $110,000. Those covenants not to sue are plainly intended by their terms not as releases but only covenants not to sue, and it is expressly set out that the amount paid was not satisfaction which would discharge the liability of the remaining tort-feasor, Clapper. However, the amount paid should be considered as a pro-tanto credit, which in this instance, exceeds the liability of the plaintiff, Clapper to the defendant, Original, even after trebling the amount of compensatory damages sustained by the defendant, Original, as a result of the plaintiff and his

co-conspirators' antitrust violations. That is to say, by trebling the compensatory damage sustained by the defendant, Original, the figure of $82,834.05 is obtained. By crediting against this sum the amount of $110,000, the amount paid the defendants under the covenants not to sue, the liability on plaintiff Clapper for compensatory damage to defendants is completely liquidated. But even though there is no further liability on the plaintiff Clapper for compensatory or general damages, there still remains his ability for the payment of defendants' attorney's fees for services rendered in defending the patent infringement action, which the court finds to fall within the category of "exceptional cases" as evidenced by the whole of the findings herein. As heretofore found, a reasonable attorney fee and reimbursement of counsel for miscellaneous expenses in rendering legal service in the patent infringement phases of this case is the sum of $28,244.31. As a part of the judgment in this proceeding, the plaintiff Clapper will be ordered to pay such sum to defendants' counsel of record. In addition to the payment of attorney's fees in connection with the patent infringement action, the defendants are entitled to have and recover from the plaintiff Clapper, reasonable attorneys' fees for the services of their attorneys in the prosecution of defendants' counterclaim and crosscomplaint for antitrust violations on the part of plaintiff Clapper and Flora and their co-conspirators. Such attorneys' fees will be fixed by the court upon petition of counsel for the defendants and after hearing thereon.

In addition to the foregoing attorneys' fees, defendants are entitled to recover fully the costs of suit laid out and expended by them in their defense to each cause of action brought against them in the five paragraphs of complaint, and in the prosecution of their counterclaim and crosscomplaint for the antitrust violations.

76. The general release dated November 23, 1949, between the Cabette Company and Original Tractor Cab Co., Inc. was executed and signed by Cabette but was not executed by Original or Williams.

77. The unexecuted general release was prepared as and for settlement of the controversy between the parties thereto. It did not contemplate or involve any settlement for violation of the antitrust laws and would not settle such matter. Consequently it does not release the plaintiff from liability for damages to the defendant, Original.

78. Some evidence is in the record tending to indicate that tractor covers sold during the working arrangement between Original and Cabette in 1949 were identified as "half Cabs" rather than "Original Cabettes", as contemplated by the parties. If this was a violation of the arrangement between Original and Cabette, it is nothing of which the plaintiff may complain and does not constitute, without more, any evidence of unclean hands with respect to the subject matter of the counterclaim for damages for violation of the antitrust laws. The evidence does not show that the defendants had knowledge of the illegal conspiracy at and subsequent to the meeting in Chicago on September 12, 1949. The acts of the defendants under the economic duress imposed by such conspiracy in yielding to the pressure imposed by the conspiracy does not make the one who thus yields a party to the conspiracy. The evidence does not show unclean hands on the part of the defendants with respect to this action for damages.

Conclusions of Law

From the foregoing facts the court concludes:

1. That this court has jurisdiction over the parties and the subject matter in this cause of action.

2. The first cause of action for declaratory judgment, having been withdrawn by the plaintiff, is dismissed.

3. The charge of unfair competition included in the second cause of action is dismissed.

4. The third cause of action, for false patent marking, having been withdrawn by the plaintiff, is dismissed.

5. There was no valid agreement between the plaintiff and the defendants entered into on September 12, 1949, or subsequently, with respect to discontinuance of manufacture of tractor covers, and judgment on the fourth cause of action for breach of contract, is entered for the defendants.

6. The Clapper patent is invalid.

7. The subject matter of the Clapper patent was fully anticipated in the art, was an obvious adaptation, and an unpatentable aggregation.

8. Whether the Clapper patent has been infringed by the defendants is moot in view of the court's conclusion of law that the Clapper patent is invalid.

9. The plaintiff's second cause of action is dismissed.

10. The Agreement of August 3-4, 1948, is per se violative of Section 1 of the Sherman Act.

11. The Agreement of August 3-4, 1948, also violates Section 2 of the Sherman Act, in that it manifests an attempt to monopolize, by the combining of non-competing patents in a single agreement by competitors, and gives to the parties to the agreement veto power over patent rights that are not referable to their individual businesses, or licenses granted, even though the licensees may have continued to compete with each other, after the execution thereof. They are jointly given an exclusive market and

control thereover by the terms of the agreement, and not singularly as a consequence of patent privileges acquired.

12. A conspiracy or combination having as its object or effect a restraint of interstate trade and commerce, whether accomplished by legal or illegal means, falls within the ambit of Sections 1 and 2 of the Sherman Act, and is condemned thereby. Patent rights give no protection from the prohibitions of the Sherman Act, when they are associated, controlled, or used in consequence of an agreement, that is in restraint of interstate trade or commerce.

13. When the two individual patentees, Clapper and Flora, combined their patents, they monopolized and contracted between themselves and with their licensees, to secure mutual benefits for themselves and their licensees, that are not given to them by the patent laws, and which agreement gave to the opposite patentee and licensees, a right of control over patent rights that may be associated and used in restraint of interstate trade and commerce; the purpose and result of such an arrangement and conduct was a violation of Sections 1 and 2 of the Sherman Act.

14. The patentees and their licensees had no legal right to act in concert and join hands in an agreement shown to be in violation of the Sherman Act, thereby refusing a license to another manufacturer in the field, even though the latter was carrying on some business in violation of those patents.

15. Defendants are entitled to recover damages from the plaintiff as a result of losses suffered as a result of actions of the plaintiff, together with Flora and their licensees, and resulting to the business of the defendant, Original, in the following amounts:

(1)	Costs resulting from forced stoppage of production, from August 22, 1949 through September 23, 1949	$ 2,561.45
(2)	Expenses incurred in finance negotiations	317.20
(3)	Advertising costs rendered useless by reason of forced work stoppage	4,563.70
(4)	Loss of potential sales to Farm Equipment Sales Co. for the years 1949 through the first eleven months of 1956	12,263.40
(5)	Loss of potential sales to Stover-Winsted Co. for the years 1949 through the first five months of 1952	7,905.60
	Total	$27,611.35

16. The damages assessed against the plaintiff shall be increased threefold in accordance with the Clayton Act; however as against that threefold amount, the plaintiff Clapper is entitled to credit the sum of $110,000 heretofore paid by Flora and the cross-defendants.

17. The covenants not to sue entered into between the defendants and Flora and the cross-defendants, were not releases, and do not discharge the liability of the plaintiff for violation of the antitrust laws.

18. The defendants are not estopped from asserting their counterclaim for damages under the Clayton Act by the arrangement made with the Cabette Company in October, 1949.

19. The third cause of action for breach of contract is dismissed.

20. Judgment shall be entered for the defendants on the counterclaim, and in the judgment it shall be ordered that the defendants have and recover of the plaintiff Clapper, attorney fees and reimbursement of miscellaneous legal expense in the amount of $28,244.31 for the services of defendants' counsel in their defense to the patent infringement action in this case. It shall also be ordered that defendants are entitled to reasonable attorney fees, to be fixed by the court upon petition and hearing, covering the services of defendants' counsel in the prosecution of the counterclaim and cross-complaint for antitrust violations on the part of plaintiff Clapper, together with Flora and their co-conspirators. In addition to the payment of the attorney fees aforesaid, the defendants shall fully recover of the plaintiff their total costs of suit laid out and expended in this cause.

Let judgment be entered accordingly.

Correcting Entry for January 14, 1958

After the court entered its findings of fact and conclusions of law herein, it occurred to the court that in finding and concluding that defendants were entitled to have and recover from plaintiff Clapper, reasonable attorney fees for the services of their attorneys for prosecuting the defendants' counterclaim and cross-complaint, that the court erred in including services rendered by defendants' counsel in the prosecution of defendants' cross-complaint against the cross-defendants.

Accordingly, it is now ordered that the findings of fact and conclusions of law heretofore entered by the court in this cause be amended to exclude from consideration, attorney fees for defendants' counsel covering services rendered in the prosecution of the defendants' cross-complaint against the cross-defendants. That is to say, the attorney

fees to be allowed defendants' counsel in connection with the prosecution of the antitrust phases of this action will be limited to services rendered upon the defendants' counterclaim.

Memorandum

July 9, 1958

STECKLER, Chief Judge.

This cause is now before the court upon the following matters:

(1) The fixing of attorneys' fees to be awarded defendants' attorneys for prosecuting the counterclaim for antitrust violations.

(2) Motion of defendants for admission of attorneys' itemization.

(3) Motion of plaintiff for an order requiring defendants' counsel, John F. Linder, to file an itemization of his charges for services on the antitrust cause of action.

(4) Motion of defendants to amend findings of fact and conclusions of law.

(5) Plaintiff's post-hearing brief anent attorney fees, and motion to amend findings of fact and conclusions of law, etc.

(6) Plaintiff's objections to defendants' bill of costs.

(7) Motion for production or for leave to take additional depositions.

(8) Motion for admission of plaintiff's Exhibits 199 and 200.

Since the last two above mentioned motions go to the matter of admitting additional evidence into the record, the

court deems it advisable to take up and dispose of such motions before turning to the other motions.

On May 2, 1958, plaintiff filed his motion for an order requiring defendants to produce, for inspection, photographing and copying, all written documents, instruments and agreements made or entered into contemporaneously with plaintiff's Exhibits 172 and 173, containing any other terms or conditions of the settlement agreement, etc. (privileged communications between attorney and client to be excepted); or in the alternative, for an order permitting plaintiff on five days' notice to take the deposition of any one or more of the parties listed in paragraph IV of the motion for the purpose of establishing the existence of the "hitherto undisclosed terms and conditions of the settlement."

Since the defendants made satisfactory voluntary production of the documents sought (plaintiff's proffered Exhibits 199 and 200), the motion for production or the alternative request for depositions are now moot and of course the court will make no ruling thereon.

On June 9, 1958, plaintiff filed his motion for admission of his proffered Exhibits 199 and 200. The court has carefully considered this motion, including the contents and substance of the exhibits which were attached thereto (plaintiff's proffered Exhibits 199 and 200). After such consideration and a further re-evaluation of the evidence, including the settlement agreement and the covenant not to sue which were entered into with plaintiff's co-conspirators, the court is of the opinion that nothing would be gained on the part of the plaintiff through an admission of plaintiff's proffered exhibits, and that accordingly the motion should be and the same is hereby overruled.

The court will stand on its prior ruling whereby it has found that the plaintiff has not been released as a tort-feasor by the terms of the settlement and covenant not to sue executed by the defendants in connection with their settlement with the other alleged joint tort-feasors. Moreover, plaintiff's proffered Exhibit 200, the waiver and release of attorneys' lien, would not give aid to the plaintiff in his contention that he is absolved from payment of attorneys' fees by reason of his claimed release based upon this construction of the covenant not to sue. The waiver and release of attorneys' lien amounted to no more than what it purported to accomplish, i.e., to cause defendants' counsel not to look to Comfort Equipment Company, Burch Manufacturing Company, Cab-Ette Company and Lee Flora, plaintiff's co-conspirators, for the payment of any fees whatsoever, in any of the then pending litigation in three different district courts, in consideration of the execution of the agreement of settlement. The defendants, Williams and Original, were not parties to the waiver and release of attorneys' lien. Only their attorneys had such a lien to waive and release. Surely plaintiff cannot seriously contend that by such action on the part of defendants' counsel, the defendants are now precluded from recovering as a part of their statutory remedy, a reasonable attorneys' fee and costs as provided by the antitrust laws. Such an argument seems frivolous beyond words when considered in the light of the entire record in this case. Suffice to say that this court believes that the defendants as parties litigant are still entitled to recover a reasonable attorney fee for the use of their attorneys against their remaining defeated adversary in this long and expensive litigation.

|1| The court will next take up the matter of fixing the attorney fees to be awarded defendants' attorneys for their services in prosecuting the counterclaim for damages

sustained by defendants as a result of plaintiff's violation of the antitrust laws.

Defendants' counsel have submitted evidence by way of expert testimony and itemized statements tending to show that they have earned attorneys' fees for services in their antitrust cause of action totaling $141,035. This they are claiming in addition to the attorneys' fees in the amount of $28,244.31 heretofore fixed by the court for their services in the defense of the patent infringement action.

The court has awarded compensatory damages to the defendants in the amount of $27,611.35 which, when trebled, amount to $82,834.05. Against this sum has been credited $110,000 received by the defendants from plaintiff's co-conspirators for a covenant not to sue. Thus the court now finds what remains to be done is the fixing of defendants' attorneys' fees in the antitrust phase of the lawsuit.

The court has carefully considered the evidence and post-trial briefs relating to attorneys' fees in the antitrust cause of action. The court is not unmindful of the complexities of the case, nor of its far-flung reaches. The case has been in process for over eight years and has consumed hundreds of hours of the court's time. Nor is the court overlooking the fact that it is convinced that this action was brought as a furtherance of the conspiracy, which the court believes had its inception prior to the granting of the patent in issue. Notwithstanding all of this, the court is bound by the authorities relative to the matter of fixing attorney fees in this type of action, particularly the rule as followed in the Seventh Circuit. See Milwaukee Towne Corp. v. Lowe's, Inc., 7 Cir., 1951, 190 F.2d 561. See also Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 8 Cir., 1952, 194 F.2d 846.

With the Milwaukee Towne Corp. case as a guide, the court concludes, and therefore finds that the request for attorneys' fees in the amount of $141,035 for services of defendants' attorneys in the anti-trust cause of action, does not bear a realistic relation to the amount of compensatory damages awarded. With regard to this finding, the court is not in accord with the views of the defendants whereby they would have the court include as a part of the basis of compensatory damages, the amount of $28,244.31, the attorney fees fixed for their services in defending the patent infringement action. No convincing authority has been shown to support their position in that regard. Nor does the court agree with the defendants in respect to their position that the court ought to readjust the credit allowed on the damages awarded. Defendants would have the court deduct their expenses and claimed attorneys' fees in connection with the venue issue from the $110,000 paid defendants pursuant to the covenant not to sue, using the balance as a credit against the trebled compensatory damage. Likewise, as in their claim that the attorneys' fees for defending the patent action should be included as a part of the compensatory damage in computing the treble damages, they have shown no authority to support their position and the court has been unable to find any.

Approaching the issue of attorneys' fees from the other side, plaintiff would have the court disallow all fees for defendants' attorneys prior to the entry of December 14, 1954, the order of dismissal, whereby the complaint was dismissed by Flora as against the defendants, Williams and Original, and the counter-claim and cross-complaint dismissed by Williams and Original against Flora, Comfort, Burch and Cab-Ette. This is on the theory that attorneys' fees are to be included as part of the costs and that item four of the order of dismissal provides, "That

no costs be awarded to any party litigant designated in this order, the respective parties litigant bearing their own costs." This theory, as so many others proffered by plaintiff, at first blush might seem to have some merit, and the court is not wholly ignoring it. But the plaintiff does not stop there; he goes on and asks to be completely exonerated from payment of all costs and attorneys' fees incurred during the three-year period devoted to the venue issue involving his co-conspirators and the appeal taken from the order of this court in respect thereto. He would have the court believe his hands are stainless of the part he played in the conspiracy. During that time he was as much of a litigant in the antitrust cause of action as at any other time throughout the long course of this controversy. It was he who reaped the greatest benefits from the conspiracy. The presence of the co-conspirators before the court, more than anything else, made it possible for the court to ascertain the true relationship between them and the plaintiff and thus the existence of the conspiracy. Not only that, it should be borne in mind that the District Court for the Western District of Missouri, on October 27, 1953, had enjoined and restrained the plaintiff from instituting any proceeding, judicial or administrative, for infringement of plaintiff's patent alleged to have occurred prior to such date. It can be concluded from that injunctive decree that the Missouri District Court intended to deprive the plaintiff of the fruits of his patent during the period of the existence of the conspiracy, which this court has also found to have existed prior to the Missouri District Court action. And this court has found that by the bringing of this action in the Southern District of Indiana, the conspiracy was furthered, that this action was a part of the conspirators' scheme to effectively carry forth their conspiracy and help bring it into complete fruition. Why the Missouri District Court made no men-

tion in its decree of the "maintenance" of any pending infringement action at the time of its decree is unexplained. But to say the least, it is not logical to believe that that court intended to exempt this action in this district merely because it had been brought prior to the date of its injunctive decree. Since there is no conclusive evidence on this point before this court, it is assumed that the Missouri District Court, out of judicial conservatism and comity, left the matter of the pendency of this action to the discretion of this court in view of the pending counterclaim and cross-complaint. The decree there was a consent decree without the benefit of findings of fact and conclusions of law. Certainly the spirit of that court's decree would dictate that this action for patent infringement especially in view of the record in this proceeding, should have abated at the time of that decree. Instead of withdrawing the complaint for patent infringement, the plaintiff and his co-conspirator, Flora, chose to pursue the action beyond the date of that decree, even though they knew it was a remnant of their earlier conspiratorial actions.

Of course the plaintiff does not agree with such a construction of that decree, and the court here being somewhat in doubt as to its full meaning, concluded that this entire litigation should be heard on the merits. Except for such doubt, this court should have dismissed the complaint here in suit.

With the foregoing in mind, the court concludes that its order of December 14, 1954, did not relieve plaintiff from payment of a just portion of the attorneys' fees and costs during the pendency of the venue litigation. Out of fairness, however, the court should not fail to consider as a weight factor in determining a reasonable attorney fee for defendants' attorneys in the antitrust litigation, the

recovery made and the attorneys' fees received in connection with the $110,000 paid by plaintiff's co-conspirators. Though the arrangement between defendants and their counsel was a private one, not subject to the control of the court at the time of payment, nonetheless, it cannot be altogether ignored in the separate matter of assessing attorneys' fees at this time.

Therefore, considering the evidence in the light of the court's first-hand knowledge of much of the services performed by defendants' attorneys, and the value thereof, the court finds that a reasonable fee for their combined services should be, and is hereby fixed in the amount of $25,000. As to the division of such amount, counsel will be left to their own discretion.

The court is well aware that this sum represents just a little less than the compensatory damage found to have been sustained by defendants, but except for the difficulty of proof, it is ventured that the actual damage suffered as a direct result of the violation of the antitrust laws by the plaintiff and his co-conspirators would have been found to be far greater.

Motion of Defendants for Admission of Attorneys' Itemization, and Motion of Plaintiff for an Order Requiring Defendants' Counsel, John F. Linder, to File an Itemization of His Charges, for Services on the Antitrust Cause of Action

Since the court has now disposed of the matter of fixing the amount of attorneys' fees for the defendants' attorneys in prosecuting the antitrust cause of action, the motion of defendants for admission of attorneys' itemization, and motion of plaintiff for an order requiring defendants' counsel, John F. Linder, to file an itemization of his charges, are considered to be moot.

Motions to Amend Court's Findings of Fact and Conclusions of Law

Next the court turns to the respective motions filed by each side for amendment of the court's findings of fact and conclusions of law. Their motions and supporting briefs have been carefully read and considered. After such consideration and further review of the pertinent parts of the record, the court concludes that it will stand on the findings of fact and conclusions of law heretofore made.

Plaintiff's Objections to Defendants' Bill of Costs

The court now turns to the plaintiff's objections to the bill of costs submitted by the defendants. Their bill of costs was filed on January 27, 1958. On February 11, 1958, the plaintiff filed objections thereto. Due to the complex issues involved, many of which were previously argued, the clerk of the court made no attempt to tax the costs. Therefore, this matter is not being considered on review of the actions of the clerk, but by the court in the first instance.

The bill of costs totals $39,257.26, and with certain minor exceptions, the plaintiff objects to the whole thereof. Following is a categorical breakdown of the items listed in the original bill of costs:

Item 1	Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case.	$ 1,453.76
Item 2	Fees for witnesses (28 U.S.C. § 1821)	75.28
Item 3	Fees for exemplification and copies of papers necessarily obtained for use in case	207.98
Item 4	Docket fees under 28 U.S.C. § 1923	72.50
Item 5	Costs incident to taking of depositions	1,077.09
Item 6	Schedule I—Services, travel and telephone expense of defendant Williams	27,189.53

Item 7	Schedule II—Travel and telephone expenses of defendants' attorneys	3,979.17
Item 8	Schedule III—Expense for services of defendants' accountant	4,950.00
Item 9	Schedule IV—Miscellaneous costs of certified copies of Patent Office records and notary fee	251.95
		$39,257.26

Since filing the original bill of costs, defendants were ordered to itemize with greater particularity Items 1, 3 and 5 of the bill. In their response to that order, which, incidentally was not a satisfactory response and therefore required an additional itemization, defendants called the court's attention to "slight differences" in the amounts of court reporter charges and deposition charges, and asked that the amounts as set forth for such items in the original bill of costs be changed to show the sum of $1,733.64 for court reporter charges, and the sum of $1,050.04 for costs incident to taking of depositions. After such correction, the total amount of the bill of costs would amount to $39,510.09, an increase of $252.83. However, it is apparent that these figures must further be amended in view of defendants' "Further Itemization of Costs" which was filed on May 20, 1958. According to the last itemization, the charges for court reporter amount to $1,688.73, and the costs incident to the taking of depositions amount to $1,049.64. The court will therefore treat the bill of costs to be amended as requested and according to the latest itemization amounting to $39,464.78.

Before taking up the objections to the various items in the bill of costs, it would be helpful to the parties if the court would set aright what appears to be a misgiving on the part of the defendants with respect to the meaning of certain language used in the court's findings of fact

and conclusions of law dated January 13, 1958. In its findings and conclusions, the court stated, "In addition to the payment of attorneys' fees aforesaid, the defendants shall fully recover of the Plaintiff their total costs of suit laid out and expended in this cause." This was not the best choice of words in view of what the court had in mind at the time. The court intended merely to have the statutory costs, including the reasonable costs incident to the taking of depositions, assessed against the plaintiff. It was not the intent of the court to go beyond what is normally and customarily included in the assessment of costs in this type of action. Therefore a great bulk of the defendants' bill of costs will be disallowed in fixing the costs to be taxed against the plaintiff.

Perhaps it would also be well at this point to dispose of certain objections which the plaintiff interposes and which flow to the question of whether the defendants should be permitted to recover any costs after the date of the settlement with the plaintiff's co-conspirators, and to the question of whether plaintiff should be taxed with any of the costs incurred in connection with the trial and disposition of the issue of venue. These objections affect all of the items of costs and must be considered in addition to the specific objections to the respective items.

Plaintiff says that by reason of the terms of the agreement made in connection with the execution of the covenant not to sue and the order of the court of December 14, 1954, approving the simultaneous dismissal of the complaint on behalf of Flora as against the defendants Williams and Original, and the counterclaim and cross-complaint on behalf of said defendants as against Flora, Comfort, Burch and Cab-Ette, he, the plaintiff, is exonerated from the payment of costs. Then, moreover, the plaintiff says he took no active part in the trial and dis-

position of the issue of venue. He says that during the period "from the spring of 1951 through the fall of 1954 the venue dispute occupied the stage, with the Clapper issue completely sidetracked." He claims that he did not participate in the long venue battle in any way; that during the long period of delay the battle was confined to the defendants on the one hand and the cross-defendants on the other.

The settlement agreement which was made at the time the covenant not to sue was given by the defendants to all of the co-conspirators, except the plaintiff Clapper, provided that the dismissals "shall be entered without an award or payment of costs * * * all parties paying their own costs."

The court's order of dismissal of December 14, 1954, specified, "4. That no costs be awarded to any party litigant, designated in this order, the respective parties litigant bearing their own costs." In view of the terms of the agreement and the court's order of dismissal, plaintiff concludes that the defendants are thereby bound to bear their own costs up to the date of the order, December 14, 1954. Now in addition to the foregoing, plaintiff further contends that he is in fact released from all liability because the agreements and the covenant not to sue constitute a legal release of plaintiff's joint tort-feasors, and by operation of law, he too is released.

A similar position was taken by the plaintiff in his opposition to the matter of awarding attorneys' fees to defendants for the services of their attorneys in the anti-trust phase of this case. What the court has said in that regard will not be fully repeated here. The court disagrees with the theory of the plaintiff, first, because throughout the pendency of this action the plaintiff has been a most

active litigant in the antitrust phase of the suit. Actually that phase of the suit has overshadowed the patent infringement action, both from the activities of the plaintiff and the defendants. Had it not been for the fact that the plaintiff's co-conspirators were brought into this court, the scope and effect of the conspiracy might never have been known. Plaintiff's argument that he took no active part in the case during the venue battle does not bear weight.

[2] Plaintiff seems to take the position that since he did not participate in the venue dispute as much as the other litigants, he should only be taxed, if at all, in proportion to the extent of his participation. Bearing in mind the court has found him guilty of violation of the antitrust laws, there is no logical reason why he, as one of the joint-wrongdoers, should not be held accountable for the full amount of the court costs. It is only in rare cases where one of several joint-wrongdoers is absolved from full liability for court costs. In the case of Vrooman v. Penhollow, 6 Cir., 1911, 186 F. 495, 496, a patent infringement action, one of three defendants made a motion that the costs adjudged against them be distributed among them in proportion to the extent of their participation in the infringement complained of. In the trial below, the evidence was scant as to the extent of the participation of this particular defendant in the infringement. This minor issue received little attention during the trial because of the larger contest over patent infringement. In denying the motion of the complaining defendant, the court said:

> "It is apparently true that in some rare cases where there were several wrongdoers, some of whom had participated in doing the wrong only in a trivial or almost wholly unrelated manner, the court has exercised its discretion in their favor and cast the heavier burden of the costs to which all are liable

> upon the more guilty parties. But such cases are exceptions to the general rule upon very special circumstances. We think the position which Baker has taken and held in this matter has not been such as ought to induce the court to exercise its discretion in his favor. We have the conviction, that he was the most potent factor in the infringement and that it was mainly because of his countenance and encouragement that the other defendants persevered in it.

And so it was in the case at bar. The plaintiff Clapper was the dominant figure in the conspiracy. He stood to gain the most and did gain the most from the fruits of the joint-wrongdoings. How, then, can this court exercise its discretion in his favor and shift the costs incident to the venue question over and upon the successful defendants? Certainly not merely because the plaintiff says he did not participate very much in that part of the litigation.

The terms of the agreement and the order of dismissal of December 14, 1954, do not preclude at this stage of the litigation the taxing of the defendants' costs against the plaintiff. Plaintiff was not a party to the agreement nor the covenant not to sue, and he was not included in the order of dismissal. Nor did the court by entering the order of dismissal intend it to have the legal effect plaintiff now claims. The court knows of no rule or theory of law that would preclude the defendants from agreeing with a part of the other litigants that they would bear their own costs up to the time the covenant not to sue was executed and the dismissal entered, and look forward to an ultimate recovery of such costs from their remaining defeated opponent, should they be successful. Whether the court in assessing costs under such circumstances should take into account the prior consideration paid for the covenant not to sue, seems to be a matter to be left to the sound discretion of the trial court.

Throughout plaintiff's argument he fails to draw a distinction between such costs as should be awarded the successful defendants in connection with the patent infringement issue, and the costs which should be awarded in regard to the antitrust phase of the case. Keeping in mind all of the issues in this action, it is doubtful whether such a distinction can be accurately drawn. The court, therefore, must weigh and evaluate the respective items of cost and the objections made thereto, whether such items were incurred prior or subsequent to the dismissal as against the other parties, or whether in connection with the patent or antitrust issues.

The court has previously ruled that the agreement and covenant not to sue did not constitute a legal release but was only a covenant not to sue.

[3] For these reasons the court now holds that the plaintiff has not been relieved of paying the defendants' legitimate costs of suit.

[4] The court will now deal with the items of costs as they are listed in the bill of costs and consider them in the light of plaintiff's objections.

Item 1

Fees of court reporter for all or any part of the transcript necessarily obtained for use in the case— $1,688.73

Plaintiff objects generally to the allowance of this item but particularly objects to the assessment of any costs against the plaintiff for an extra copy of the transcript of the testimony taken during the trial. Plaintiff argues that such extra copy of the transcript was merely for the convenience of counsel and therefore not necessarily obtained for use in the case. By inference plaintiff also ob-

jects to the cost of the original stenographic transcript furnished the court. This is on the premise that the court did not order a transcript of the evidence. Plaintiff, for authority in support of the first proposition, cites Hope Basket Co. v. Product Advancement Corp., D.C.Mich.1952, 104 F.Supp. 444; Department of Highways v. McWilliams Dredging Co., D.C.La.1950, 10 F.R.D. 107; Kenyon v. Automatic Instrument Co., D.C.Mich.1950, 10 F.R.D. 248; Stallo v. Wagner, 2 Cir., 1917, 245 F. 636. For his second proposition, plaintiff cites and relies upon Firtag v. Gendleman, D.C.D.C.1957, 152 F.Supp. 226; Marshall v. Southern Pacific Co., D.C.Cal.1953, 14 F.R.D. 228, and Cooke v. Universal Pictures Co., D.C.N.Y.1955, 135 F.Supp. 480. From a reading of these and other cases, one thing is made abundantly clear; the fixing and allowing of court costs vary in different districts and according to the judicial discretion of the various judges in view of the varying circumstances in the respective cases. Of course there are generally fixed standards which should be followed, but in each case the matter of allowing costs must be determined according to the peculiar facts and circumstances.

[5] In this court it has been a custom of long standing, amounting to an unwritten rule, that in any case when a party orders a transcript of the evidence, the original transcript must be furnished the trial judge and the expense thereof must be borne by the party ordering the same, or, as the court otherwise directs. In the case at bar, since the court early in the proceedings made it known to counsel that in view of the complexities of the case they would be required to prepare and submit proposed findings of fact and conclusions of law, it is nothing more than reasonable that counsel and the parties should have anticipated the need of a transcript of the evidence

and the cost incident thereto. Therefore the court concludes that defendants are entitled to recover as costs in this proceeding their expenditures toward the cost of the original stenographic transcript of the evidence and minutes of the trial. Also, the cost of one copy for the use of their counsel in the conduct of the trial and in the post trial procedures which were required by the court. The court will not, however, order the plaintiff to pay the costs of reporters' fees and charges for transcripts of oral arguments which were had at various times through the pendency of this action. Such transcripts, it is felt, were principally for the convenience of counsel and should be borne by the party requesting them.

With these pronouncements as a guide, the following costs under Item 1 of the bill of costs will be taxed against the plaintiff, but in respect to all other costs thereunder the plaintiff's objections are sustained:

May 18, 1953

Walene E. Shields Transcript from trial of venue. One-half of cost of original (391 pages)	$ 107.53	
One-half cost of two copies @ 25¢ per page ($195.50)	97.75	
Postage	1.44	
		$ 206.72

June 11, 1957

E. Clifford Powell Daily copy (carbon) of trial June 3, 4, 5, 6 57 869 pages @ 40¢	347.60	
17 pages index @ 80¢	13.60	
		361.20

August 10, 1957

E. Clifford Powell Transcript of trial, 6 20-28 57 1,481 pages @ $1.05	1,555.05	
26 pages index @ $2.10	54.60	
1½ days reporter @ $25	37.50	
One-half due by Original		823.57
Total Allowed—Item 1		$1,391.49

Item 2

Fees for Witnesses (28 U.S.C. § 1821)—$75.28

[6] Plaintiff objects to the allowance of this item of costs except with respect of Ralph L. Morgan—$19.20, Ray Steffey—$8.62, and Harold B. Hood—$4.00. As to the witness fee and mileage for the defendant Williams, plaintiff points out that he being a party to the action and a real party in interest, attended throughout the whole of every day of both sessions of the trial, and actively participated in the management thereof; that therefore he did not, in other words, attend merely as a witness. Such being the case, the claimed witness fee and mileage for him is not allowable. Plaintiff cites Barnhart v. Jones, D.C.W.Va. 1949, 9 F.R.D. 423; Picking v. Pennsylvania R. Co., D.C.Pa.1951, 11 F.R.D. 71; Ryan v. Arabian American Oil Co., D.C.N.Y.1955, 18 F.R.D. 206; and Tuck v. Olds, D.C.Mich.1886, 29 F. 883.

[7] Similarly, as to the witness fee for defendants' counsel, Messrs. Swecker, Linder and Earnest, plaintiff argues that since all of them were attorneys of record in this case and actively participated in the conduct of the trial, they should not be permitted to shift position from counsel table to witness chair and thereupon be entitled to witness fees. The court agrees with the plaintiff. Accordingly only the following costs will be allowed under Item 2 of the bill of costs:

Ralph L. Morgan	$19.20	
Ray Steffey	8.62	
Harold B. Hood	4.00	
Total Allowed—Item 2		$31.82

Item 3

Fees for exemplification and copies of papers necessarily obtained for use in case—$207.98

[8] To this item the plaintiff objects because there has been no itemization of the amount sought. Plaintiff relies upon Judge Hincks' ruling in Perlman v. Feldmann, D.C.Conn.1953, 116 F.Supp. 102, 112. There, upon timely objection, Judge Hincks disallowed an item of costs covering the making of copies of unidentified documents. This court would be inclined to rule similarly on the item here at hand except for the court's own knowledge of the manner in which the parties dealt with each other in providing copies of the very great number of letters and documents here involved. The court recalls the many conferences and informal agreements among counsel with respect to furnishing each other documents or copies of documents. Admittedly it would be far better for the problem now presented if the defendants had kept an itemized list identifying each letter, invoice, circular, catalog page, work sheet, etc., which they had reproduced, with a further explanation as to how it was used in the case.

Counsel for the defendants point out that this item covers photostatic and other reproduction costs of literally hundreds of letters, invoices and many different types and kinds of papers for use in this case only. A part of the cost here involved was actually paid Mr. Scofield, counsel for plaintiff, for copies of the Clapper letters that

he furnished. Defendants say that when the plaintiff demanded and received large quantities of records taken from the defendant, Original, letters, invoices, purchase orders, shipping notices, etc., photostatic copies were made of those and the cost thereof is here included. Counsel for the defendants say it would be the work of supererogation to list all of the many documents thus copied, even if the court had the time to read such a list. In other words, it would be beyond what is required. The court agrees.

In view of the court's own knowledge of the many, many documents used in the case, and since this is a matter within the court's judicial discretion, and further in view of the oath of defendants' counsel that the item of $207.98 is correct and necessarily incurred in this action, this item of costs will be ordered taxed.

Amount of Item 3 Allowed $207.98

Item 4

Docket fees under 28 U.S.C. § 1923—$72.50

[9] Objection is made on the basis that this lump sum item is not broken down. Defendants in their brief say that they filed twenty-one depositions and are charging merely the $2.50 statutory fee per deposition. The remaining portion of the $72.50 item represents the $20 statutory attorneys' docket fee.

In this court no charge is ever taxed by the clerk for filing a deposition. The attorneys' docket fee will be allowed as a part of this item.

Amount of Item 4 Allowed $20.00

Item 5

Costs incident to taking of depositions—$1,049.64

[10] Quoting the plaintiff, his objection to this item is as follows:

> "Most of the items under the heading 'Depositions' reflect disbursements made in 1951 and 1952, and these of course cannot be allowed in view of the court's order of December 14, 1954 requiring the defendants to bear their own costs as to all matters up to that date. Some of these deposition expenses would not be allowable for the further reason that they were discovery depositions not introduced into evidence in the case. Insofar as the amounts reflect disbursements for *carbon copies* of depositions obtained by plaintiff's counsel for their own convenience (the original being on file with the Clerk), no allowance for the copy would be proper."

Plaintiff goes on to object to the items of expense covering the depositions of the plaintiff Clapper, and the defendant Williams, and also the expense of the carbon copy of the deposition of McVicar taken at Bloomington, Illinois.

Insofar as the objection is based on the court's order of December 14, 1954, by reason of what the court has previously said in this memorandum, it follows that the objection must be overruled. As to the expense covering the extra copies of the various depositions, the court is firmly of the view that it was not merely convenient for counsel to have them, but it was imperative that they have them. This case, in the experience of the court, stands out singularly. Never before has the court witnessed such vehemence on the part of counsel and the parties. Throughout all the proceedings there has been an absence of the customary trust and professional reliance a court is ac-

customed to see on the part of counsel. Not infrequently, accusations of misrepresentation, falsification and fraudulence have been leveled by counsel at each other. From their conduct and lack of trust in each other, there should be little wonder as to why they wanted copies of everything, including every statement made during their oral arguments. In this setting and with such a background, the court is of the view that the extra copies of the depositions were reasonably necessary for the use of counsel in this case. This applies both with respect to the pre-trial procedures and in connection with the trial and post-trial procedures. Therefore, the court holds that defendants are entitled to recover the costs incident to the taking of the depositions listed in the itemization of this item of the bill of costs, including one carbon copy. Moreover, the court recalls how often it was required to call upon counsel to brief and argue certain points which necessarily required reference to the various depositions.

The court, although with some reluctance, agrees with the plaintiff in his objections to the costs of the deposition of the plaintiff Clapper taken by the defendants and the cost of the carbon copy of the deposition of the defendant Williams. It is felt that these depositions fall largely within the rule precluding the recovery of the costs of depositions taken solely for the convenience of counsel in the preparation of their case. Consequently, these two items of expense will not be allowed as a part of defendants' bill of costs.

Therefore, as to Item 5 of the bill of costs, the court will allow the following:

1951

January 18

Cost of reporting deposition taken 11/10/50 of Lee Flora and Snyder, Danville, Ill. (antitrust) $ 71.70

January 18

Cost of reporting depositions taken 11 28/50 in Kansas City of Robert D. McCarthy and Harry Burch (antitrust) 79.49

January 24

Cost of reporting Heller deposition taken in Chicago on 11/8/50 (patent infringement) 3 hrs. attendance @ $4	$12.00	
34 pages original @ 70¢	23.80	
34 pages carbon @ 30¢	10.20	
		46.00

January 24

Cost of reporting Frein deposition taken in Chicago 12/27/50 (patent infringement) 1 hr attendance	4.00	
8 pages original	5.60	
8 pages carbon	2.40	
		12.00

February 19

Cost of reporting Alveson, and others, depositions at Duluth, 11/9/50 (patent infringement) 47.66

1952

May 19

Cost of reporting Maumee Valley Seed Co. depositions at Fort Wayne on 5 14 52 (venue) Reporter's bill	154.00	
Legal services—costs in obtaining subpoenaes for witnesses	25.00	
		179.00

May 27

Cost of reporting Ruddell and Morton depositions at Indianapolis, 5 15 52 (venue)	73.50	
2 sets of photostats of correspondence produced	36.54	
		110.04

September 28

Cost of reporting McCarthy, Dolan, Bowers and Kimsey depositions at Kansas City 6 25-26 52 (venue) Attendance, 8 hrs. @ $3	24.00	
Notarial certificates	2.50	
187 pages original @ 60¢	112.20	
187 pages carbon @ 20¢	37.40	
2 sets of photostats of correspondence produced	10.45	
Postage	1.80	
		188.35

1956			
December 15			
Cost of reporting McVicar deposition taken at Bloomington, Illinois on 12/13/56 (antitrust)			
Attendance 3 hrs. @ $5		15.00	
35 pages original		26.25	
35 pages copy		8.75	
Postage		.75	
Marshal's fees for service of subpoenas		18.20	
			68.95
Amount of Item 5 Allowed			$803.19

Item 6

Schedule I. Services, travel and telephone expense of defendant Williams—$27,189.53

[11] This item is made up of expense purportedly incurred by the defendant, Original Tractor Cab Company, Incorporated, and may be broken down into three categories:

(a) The portion of defendant Williams' salary estimated to be chargeable to what are identified as "litigation matters".

(b) Travel expenses of the defendant Williams in connection with such "litigation matters".

(c) Telephone charges for calls also pertaining to "litigation matters".

There is little doubt in the mind of the court that the defendant, Original, did in fact suffer material damage as a result of this litigation. But the defendants had

their opportunity during their day in court to establish such damage. They attempted to establish the damage suffered by the corporation, but the court was not convinced by their method and theory. Now is not the time to retry this element of their case. Nor is the taxing of costs of suit the proper means of fixing such damage. For this and the reason earlier set out in this entry, all of Item 6 will be disallowed.

Amount of Item 6 Allowed $0.00

Item 7

Schedule II. Travel and telephone expenses of defendants' attorneys—$3,979.17

|12| As authority for its objection to this item plaintiff cites Manley v. Canterbury Corp., D.C.Del.1955, 17 F.R.D. 234; Hope Basket Co. v. Product Advancement Corp., D.C.Mich.1952, 104 F.Supp. 444, 451, and Brookside Theatre Corp. v. Twentieth Century Fox, D.C.Mo., 1951, 11 F.R.D. 259. Upon the authority of these cases plaintiff says it is well settled that an attorney's travel and telephone expenses are not allowable. Stated as the general rule, the court would agree.

That this is the general rule is borne out by the weight of authorities. It is only in exceptional and compelling circumstances that courts are prone to depart from the general rule. Gibson v. International Freighting Corp., D.C.Pa.1947, 8 F.R.D. 487. Such compelling circumstances do not appear in the case at hand. Travel expense of counsel in the preparation of suit and in attending the court proceedings must generally be classified as personal expense. The same is true in respect to long distance telephone expense. Neither of these items can rightfully be classified as "costs of suit." Accordingly Item 7 of the bill of costs is disallowed.

Amount of Item 7 Allowed $0.00

Item 8

Schedule III. Expense for services of defendants' accountant—$4,950.00

[13] This item represents charges for defend[illegible] accountant in the preparation of defendants' statement of losses and for attending hearings, conferences and trial. Such services were a part of the defendants' detailed preparation and presentation of their counterclaim, and, as such, cannot be allowed as costs. It is true, a part of his time was spent in furnishing plaintiff's accountants with information they needed in making an audit of the defendants' operations. However, there is no specification in the bill of costs as to how much time was so spent. The court will hazard no estimate. For these reasons Item 8 of the bill of costs is disallowed.

Amount of Item 8 Allowed $0.00

Item 9

Schedue IV. Miscellaneous costs of certified copies of Patent Office records and notary fee—$251.95

All of the charges enumerated in Schedule IV are objected to with the exception of the certified copy of the Clapper file wrapper and interference ($24.55). Plaintiff concedes that the notary fee of $3 may be allowable if identified and shown to be applicable to this case. He also concedes that the defendants may be entitled to a portion but not all of the costs of patent copies ($78.25).

Defendants counter by pointing out that some of the copies of patents were foreign patents and photostatic copies had to be obtained, which increased the cost. A certified translation of the Swiss patent was required. A book of patents was offered in connection with the motion for summary judgment, as well as at the trial. They go

on to say that the Alverson file wrapper was made necessary "by the misrepresentation of Plaintiff's counsel with respect to it."

The court was materially aided in making its final determination as to patent validity through the earlier presentation and disposition of defendants' motion for summary judgment. By the time of the trial the court was well acquainted with the history of the prior art in this field.

The court availed itself of the Alverson file wrapper after the dispute arose with respect to the Alverson patent application. It was a necessary part of the record.

As to the file history of the Clapper patent for use of defendants' counsel during trial, in view of the matter in which the interference and concession of priority were handled as between the applicants, who later were found to be in conspiracy, the court is inclined to believe the extra copy of the history of the Clapper patent was necessary for defendants' counsels' use in the trial. All of Item 9, Schedule IV, will be allowed.

Amount of Item 9 Allowed	$251.95

Recapitulation of Costs Allowed

Item 1	Fees of court reporter for all or any part of the transcript necessarily obtained for use in the case	$1,391.49
Item 2	Fees for witnesses	31.82
Item 3	Fees for exemplification and copies of papers necessarily obtained for use in case	207.98
Item 4	Docket fees under 28 U.S.C. § 1923	20.00
Item 5	Costs incident to taking of depositions	803.19
Item 6	Services, travel and telephone expense of defendant Williams	-0-

Item 7	Travel and telephone expenses of defendants' attorneys	-0-
Item 8	Expense for services of defendants' accountant	-0-
Item 9	Miscellaneous costs of certified copies of Patent Office records and notary fee	251.95
	Total costs allowed	$2.706.43

The clerk will tax the foregoing items of costs against the plaintiff.

It is so ordered.

EXHIBIT B.

Clyde E. CLAPPER, Plaintiff-Appellee,

v.

ORIGINAL TRACTOR CAB COMPANY, Inc. and Stanley Williams, Defendants-Appellants.

Clyde E. CLAPPER, Plaintiff-Appellant,

v.

ORIGINAL TRACTOR CAB COMPANY, Inc. and Stanley Williams, Defendants-Appellees.

Nos. 12470, 12471.

United States Court of Appeals
Seventh Circuit.

Sept. 30, 1959.

Action for patent infringement in which defendants counterclaimed for damages on ground of alleged violation of antitrust laws. The United States District Court for the Southern District of Indiana, Indianapolis Division, William E. Steckler, J., 165 F.Supp. 565, entered judgment for defendant and patentee appealed. The Court of Appeals, Knoch, Circuit Judge, held that under circumstances attorney's fees and expenses incurred in patent infringement defense should have been entered as element of damages in antitrust action, and record supported finding as to amount of attorney's fees to be allowed in antitrust claim.

Affirmed in part, reversed in part and remanded with directions.

Parkinson, Circuit Judge, dissented in part.

212 F2d 371

Thomas E. Scofield, Kansas City, Mo., Claude W. Lowe, Kansas City, Mo., for plaintiff-appellant Clapper.

J. Preston Swecker, Washington, D. C., Kenneth L. Earnest, Rushville, Ind., Swecker & Mathis, Washington, D. C., of counsel for Original Tractor Cab Co.

Before SCHNACKENBERG, PARKINSON and KNOCH, Circuit Judges.

KNOCH, Circuit Judge.

This action was originally brought April 14, 1950, by Clyde E. Clapper and Lee Flora for infringement of Clapper Patent No. 2,452,834 (Hot Air Deflector for Tractors) and Flora Patent No. 2,461,974 (Enclosure for Tractors). The original defendants, The Original Tractor Cab Company (hereinafter called "Original") and Stanley Williams (its president and a director) joined licensees of Clapper and Flora as cross-defendants.[1] Original and Williams counterclaimed for misuse of patents and violation of the anti-trust laws.

By settlement in December 1954, Flora dismissed his claim for patent infringement and defendants agreed not to proceed against him or the cross-defendants under the counterclaim.

Clapper then filed an amended complaint setting up five causes of action, three of which Clapper allowed to be dismissed. Only one seems to be pursued in this Court: the claim of patent infringement.

1. Comfort Equipment Co. v. Steckler, 7 Cir., 1954, 212 F.2d 471. Two of the licensees moved to dismiss Original's counterclaim and cross-complaint on the ground that proper venue did not exist. The Trial Court overruled the motions, whereupon the two licensees sought writs of mandamus, which this Court denied.

The District Court found the Clapper patent invalid, dismissed the claim for unfair competition, found no breach of contract by defendants, held that the settlement of December 1954 did not discharge Clapper from liability under the counterclaim and awarded defendants attorneys' fees incurred in connection with both the patent and the antitrust phases of the case, as well as damages for antitrust violation.

Clapper, appealed, relying on the following alleged errors in the Trial Court's rulings and judgment:

"(1) Exclusion of Plaintiff's Exhibits 199 and 200 relating to the settlement of Dec. 14, 1954.

"(2) Denying Plaintiff's Motion to Dismiss Defendants' Counterclaim since such cross action should have been released and dismissed by the settlement of Dec. 14, 1954.

"(3) Adjudicating the Clapper patent invalid.

"(4) Awarding defendants attorneys' fees for prosecution of the patent defense phase of the case based upon its being an exceptional case.

"(5) Denying Plaintiff's Motion under Rule 37(b)(2), F.R. Civ. P. [28 U.S.C.A.], to discipline and penalize defendants for failure to comply with the Court's orders with respect to the production of documents and discovery under Rule 34.

"(6) Awarding defendants damage under their counterclaim for antitrust violation when no damage was proved which was the proximate cause of any alleged violation.

"(7) Making a separate award of attorneys' fees to defendants for prosecution of the antitrust phase of the case when no damage was proved which was the proximate cause of the alleged violation.

"(8) Refusing to consider defendant Williams' breach of the contract made with plaintiff Clapper.

"(9) Awarding Defendants costs in the case."

Defendants assert that the District Court erred in failing to include attorneys' fees, awarded for defense of the patent infringement action, as a part of the compensatory damages to be trebled under section 4 of the Clayton Act, 15 U.S.C.A. § 15. They argue that the patent infringement action was filed as part of the conspiracy in violation of the antitrust laws. They contend further that the District Court erred in failing to include damages for loss of potential sales and in awarding attorneys' fees at less than a sum proportionate to the skill and time involved. Their position is that the cause should be remanded with directions to recompute fees and damages in accordance with the foregoing.

A brief reference to the history of this litigation is appropriate here. On March 17, 1945, Clapper applied for Letters Patent, and in May, 1945, gave an exclusive license to Bearing Distributors (later Comfort Equipment Co., and hereinafter called "Comfort"). In 1948 the U. S. Patent Office declared two interferences involving applications of Flora and one Halligan.

Flora had licensed Cab-Ette Co. (hereinafter called "Cab-Ette"), and Halligan had licensed the Fort Dodge Tent and Awning Co. (later Burch Manufacturing Co., hereinafter called "Burch").

In April, 1948, Clapper, Flora, Halligan and their licensees and attorneys met to settle the interferences. The result of their efforts was the License Agreement of August 3-4, 1948, whereby Flora and Clapper jointly licensed Comfort, Burch and Cab-Ette.

In the summer of 1948, Original began manufacture of the accused device. On November 24, 1948, Clapper sent Original notice of infringement of his patent. In August, 1949, Clapper's attorney sent a second notice to Original and sent notices of infringement to Original's distributors threatening suits for patent infringement. This suit was instituted April 14, 1950, as indicated.

The group license was terminated by agreement April 6, 1953, (effective November 15, 1952) during the pendency of a civil suit brought, about a year after the initial patent infringement suit, by the Department of Justice, in the Western District of Missouri, against Flora, Clapper and their licensees, for antitrust violation. That action was terminated by consent decree dated October 27, 1953. The District Court found *inter alia*:

> "59. By the Agreement of August 3-4, 1948, the patentees, Clapper and Flora, granted a non-exclusive and non-transferable license to Comfort, Cabette and Burch to manufacture and sell tractor covers. 'The limitations imposed on the licensees by said Agreement, that the licensees would manufacture the inventions 'at their respective * * * named addresses and in no other place or places'; and that no other license would be granted 'without obtaining the written consent thereto of the remaining parties to the Agreement;' that if a license so granted was terminated, as provided in Paragraph 8 thereof Flora or Clapper, respectively, shall be at liberty to license other licensees; that the parties would 'mutually agree upon procedure for the disposition' of infringement suits; and that the parties set up a 'litigation fund' to be used for that purpose, all are elements of illegality when used for an illegal purpose, as they were."

It is apparently conceded that the joint License Agreement violated sections 1 and 2 of the Sherman Act, 15 U.S.C.A. §§ 1, 2.

After the consent decree in the Missouri case, a license was twice offered to Original and twice declined by Original, which was then contesting the validity of the patents in this cause, although prior to suit, Original had sought a license from plaintiffs.

The group License Agreement had provided for a litigation fund, of which Clapper was trustee. He directed the policing of the licensed patents. When the License Agreement terminated, the litigation fund, out of which costs of this suit had been paid, was divided between Clapper and Flora to maintain this action which was then still pending.

Clapper moved for admission of exhibits 199 and 200 as pertinent to the then pending questions of attorneys' fees, possible release of Clapper from liability under the counterclaim for antitrust violation, and Clapper's assertion that defendants had not complied fully with the District Court's order requiring production of documents. Exhibit 199 was described in the aforesaid motion as a conformed copy of the Agreement dated December 14, 1954, executed by Flora, Cab-Ette, Comfort and Burch (the three licensees) and four attorneys for defendants. Exhibit 200 was described as a conformed copy of waiver and release of attorneys' lien executed by the same four attorneys. Both documents are set out in plaintiff's appendix at pages PA-431 to 435.

The District Court found that nothing would be gained from admission of these documents and overruled the motion. However, the District Court plainly indicated that full consideration had been given to the contents of these documents, remarking that the Court stood on its prior ruling that Clapper had not been released by the terms of the settlement and covenant not to sue the other alleged joint tort-feasors. The District Court went on

to say that the waiver and release of attorneys' lien meant only that the attorneys would not look to Flora, Comfort, Burch, and Cab-Ette for payment of fees. The defendants were not parties to the release and were not thus precluded from recovering fees and costs as provided by the antitrust laws. The District Court also found that defendants had made satisfactory production. We cannot agree with plaintiff that denial of admission of these exhibits constituted error on the part of the Trial Court.

Clapper concedes that the settlement with Flora and the three licensees purported to be a mere covenant not to sue and expressly reserved any rights existing against Clapper. One of the provisions allows the covenant not to sue to be pleaded as a defense in any action taken in breach of that covenant. Clapper argues that this renders the agreement, in effect, a legal release. He cites Indiana Statutes and cases in support of the principles that release of a plurality of joint tort-feasors releases and discharges all the joint tort-feasors and that actions for violation of the Sherman Act sound in tort.

[1] Clapper relies principally on three cases to support his theory that a "covenant not to sue" is in effect a "release" if it may be pleaded as a defense to defeat the action brought by the covenantor. In Haney v. Cheatham, Supreme Court of Washington, 1941, 8 Wash.2d 310, 111 P.2d 1003, 1006, the Court said that the consideration for the covenant not to sue "reasonably compensated the releasor for the entire damage sustained." In Byrd v. Crowder, 1933, 166 Tenn. 215, 60 S.W.2d 171, the Court refers to rulings to the contrary in Massachusetts and Minnesota with the comment that in those courts, a mere covenant not to sue may be pleaded in defense of an action brought in breach of the covenant. (Burns, Indiana Statutes, Vol. 2, Sec. 2-1015 and Rule 12, Federal Rules of Civil

Procedure, permit pleading all affirmative defenses, legal and equitable.) The Court noted many conflicting decisions collected in notes in 50 A.L.R. 1081 and 66 A.L.R. 212, but concluded it is "unprofitable to do more than refer to those authorities. Our own cases clearly direct our course on the question before us." The Court also said of the covenant before it that a covenant not to sue is not a satisfaction of the claim for damages, and hence may be pleaded in the Tennessee Court only "by way of set-off or recoupment." Thus the Court in the Byrd case found an inconsistency in the provision that the covenant "may be pleaded as a defense to any action. * * *" In Pellett v. Sonotone Corp., 1945, 26 Cal.2d 705, 160 P.2d 783, 787, California Supreme Court the Court, in construing an agreement not to be a release, said:

> "The theory on which a release is held to bar a recovery is that plaintiff has accepted payment in satisfaction or in compromise of his right of action, and has released and abandoned his right of action in consideration of the payment received. In the present case there is nothing in the agreement, or in the record, to indicate that the payments * * * were intended to or did constitute any payment in satisfaction, * * * or in compromise, of the right of action."

These three cases are thus not inconsistent with the Indiana cases cited by defendants. The controlling factor is the intention of the parties. A pertinent question is: has full satisfaction been obtained by the injured party?

In Cleveland, C., C. & St. L. R. Co. v. Hilligoss, 1908, 171 Ind. 417, 86 N.E. 485, the Court stressed the fact that for a single injury there could be but one recompense and that one cannot have more than one satisfaction. The Court then said 171 Ind. at pages 423-424, 86 N.E. at page 488:

> "* * * a contract which purports to be a satisfaction and release of a wrongdoer jointly liable with others, * * * must clearly show that the injured party for a consideration, has surrendered * * * all claim for recompense for and on account of the trespass complained of. If it does so appear, there can be no further proceeding, for the right of action for the wrong is forever gone. (Citing cases)"

The Indiana court then went on to say that, in that case, the fact that plaintiff accepted the consideration in satisfaction was incontrovertible.

In Parry Mfg. Co. v. Crull, 1913, 56 Ind.App. 77, 101 N.E. 756 (case 2) the Court found from the terms of the agreement that plaintiff had not intended to accept it as full satisfaction of his claim for damages, and held that the amount paid was only a partial satisfaction *pro tanto* to the others jointly liable who were not relieved as to the residue of the damages.

In Brown v. Kemp, 1919, 71 Ind.App. 281, 124 N.E. 777, 778, the agreement stated that the consideration had been "received to my full satisfaction."

In Bedwell v. DeBolt, 1943, 221 Ind. 600, 50 N.E.2d 875, the Court held that joint tort-feasors are discharged by the unqualified release of one and that full satisfaction of one operates to discharge all. The Court went on to note that a covenant not to sue one tort-feasor did not bar action against the others, but operated only as a satisfaction of damages *pro tanto* as to benefits received.

The District Court, in the case before us, found that the agreements were mere covenants not to sue, which expressly set out that the amount received was not received in full satisfaction and that the claim against Clapper was expressly not released.

(2) Clapper also contends that making these covenants binding on successors, assigns, heirs, administrators, and executors, indicates that they were in reality releases because such words have no place in a personal covenant not to sue. He cites Jenkins v. Southern Pac. Co., D.C. 1937, 17 F.Supp. 820, 827 in support of his contention. In that case the Court did say that such words had no place in a personal covenant not to sue, but did not rely on that one factor alone. The Court observed that the form used followed the exact terminology used in California in the preparation of releases except that an effort had been made not to use the word "release." The facts of the case explain the holding and distinguish Jenkins from the case before us. Jenkins was a passenger conductor of the Southern Pacific Company, who was fatally injured while ejecting a drunken, violent passenger, Kash. Jenkins' widow, for herself as executrix and for her minor son, brought action against Kash, the Southern Pacific Railroad, the Pullman Company, Hatch (the Pullman conductor who had called on Jenkins for help with the disorderly passenger), Myers (a porter) and Dolsen (a gateman), all of whom allegedly had allowed the assault to be committed by their acts or by their failure to act. Two causes of action were pleaded: one against all defendants and one against Kash alone. After issue was joined and the case set for trial, the cause was dismissed as to the Southern Pacific and Dolsen. The remaining defendants filed supplemental answers alleging release of all claims arising out of the matters set forth in the Complaint. The "covenant not to sue" had been confirmed by the California probate court in the Matter of the Estate of Robert L. Jenkins and an order had been entered permitting Jenkins' widow, as executrix, to dismiss the action as to Southern Pacific Co. The Court held that although the theory of liability differed, the same cause of action was alleged against all

defendants. The Court stated the principle that to release all others, the release to some tort-feasors must be made with the understanding that it is given in full satisfaction. The Court cited cases to the effect that a mere covenant not to sue, which does not contain words amounting to a release of the cause of action, or which negatives such release, is not effective for the purpose of releasing other joint tort-feasors. The California Court further said that mere dismissal of some defendants would not ordinarily release the others. "The line of demarcation," the Court continued, "is sometimes very thin," and proceeded to analyze not only the "covenant not to sue," but the proceedings in the probate court, in great detail, in the light of the attendant circumstances. The Court concluded that when an instrument states specifically that it is a covenant not to sue, the Court cannot read into it words of release; that if the instrument shows on its face that it is a release, the word "release" is not essential. We agree with the District Court that the covenants not to sue in the case before us do not show themselves to be releases.

Clapper also argues that words of reservation are repugnant to the release and will be given no effect, citing Jenkins v. Southern Pac. Co., supra; The Adour, D.C., 21 F.2d 858, and McBride v. Scott, 132 Mich. 176, 93 N.W. 243, 61 L.R.A. 445.

In Jenkins, the Court found the reservation to be ineffective in the circumstances of that case. The very wording used:

> "* * * do not in any manner or respect waive or relinquish any claim or claims against any other person, persons, firms, * * *" [17 F.Supp. 823.]

reinforced the Court's opinion that the clear intent of the instrument was to give a waiver and release as to persons

named in it. No such language appears in the covenants not to sue before us.

In The Adour, D.C.Md.1927, 21 F.2d 858, the Court found that a release had been executed in New York, and that the law of New York governed. The Court stated that if there had not in fact been complete satisfaction through the transaction covered by the release, further recovery was allowed under New York decisions. The Court found sufficient evidence in the record to indicate that full award for the injury sustained had been received, that it was apparent from the paper that the intention was to discharge the liability of one of the joint wrong-doers, that the entire liability was thereby extinguished, and that any clause by which the parties sought to reserve a right of action against the other wrong-doer was repugnant to the release and void.

In McBride v. Scott, 1903, 132 Mich. 176, 93 N.W. 243, 61 L.R.A. 445 plaintiff brought suit against a number of defendants who demurred. Judgment for defendants was appealed, reversed and remanded. Two defendants paid plaintiff a sum in excess of $1,500 and were given a release which expressly stated that these defendants were "released." The document stated that "no rights whatever are released as against the other defendants, * * *." The Court in disregarding the reservation as inconsistent found that the document was actually a release of some of the defendants. There was no question raised as to its being a mere covenant not to sue.

[3] We agree with the District Court that the covenants not to sue did not discharge Clapper's liability

The Clapper patent is directed toward utilizing the heat of a tractor engine to warm the operator and facilitate use of the tractor in cold weather. Clapper describes it

as including the tractor, its frame, the engine and the fan which creates a current of air over the engine, a flexible cover surrounding the engine compartment forming a cowling between the hood and steel bow mounted in front of the operator to constitute a passageway for the heated air to the operator.

[4, 5] Clapper did not invent a new tractor. Any conventional tractor could be used. The cowl and bow are found in early patents for automobiles. These include a number of patents not cited by the Patent Examiner, thus weakening the presumption of validity which attaches to a patent by virtue of its issuance. Johnson Laboratories, Inc. v. Meissner Mfg. Co., 7 Cir., 1938, 98 F.2d 937, 943. Channelling heat back to the operator is also found in early automobile patents, notably Standish. Similar combinations are found in earlier patents such as Winet and Weiland. Clapper employed old elements known to prior art, freely available to skilled artisans, to perform their old functions. We cannot say that the finding of invalidity was clearly erroneous. On the contrary it was well supported by the record and the law. Great Atlantic & Pacific Tea Co. v. Supermarket Corp., 1950, 340 U.S. 147, 152-153, 71 S.Ct. 127, 95 L.Ed. 162; General Time Corp. v. Hansen Mfg. Co., 7 Cir., 1952, 199 F.2d 259, 265. In view of the District Court's careful analysis of the prior art, it is unnecessary for us to do more than refer to the District Court's findings.

Clapper's [illegible] to award defendant attorneys' fees for prosecution of the patent defense. The District Court found the patent infringement suit was instituted by Clapper and Flora as a part of the conspiracy in violation of the antitrust laws. If that was the ground for considering the patent action "exceptional", Clapper believes that "purging of such stigma" removed the case

from that category. Clapper considers the "stigma" to have ended when, following settlement of the antitrust violation on December 5, 1954, he proceeded individually and in his own right, without support or influence of Flora or their three licensees. He argues that he was under no disability to collect damages for patent infringement following cessation of the antitrust violation. As defendants point out, however, as late as 1955, Clapper was still seeking injunction and damages for the preceding 6-year period.

[6, 7] Clapper cited patent cases in which awards of attorneys' fees by District Courts have been reversed. In these cases the Court of Appeals found that characterization of the cases as "exceptional" was erroneous as a conclusion of law and unsupported by the record as a finding of fact. In the case before us the District Court's finding of fact No. 71 states this to be an "exceptional" case, and directs award of attorneys' fees for that reason. Defendants argue that the award is inadequate. They liken the situation here to that in Kobe, Inc. v. Dempsey Pump Co., D.C. Okl.1951, 97 F.Supp. 342, affirmed 10 Cir., 1952, 198 F.2d 416, certiorari denied 344 U.S. 837, 73 S.Ct. 46, 97 L.Ed. 651. There attorneys' fees incurred in defense of a patent infringement suit were held to be recoverable as damages sustained through antitrust violations. Here the District Court declined to include the attorneys' fees incurred in the patent infringement defense as an element of damages in the antitrust action to be increased threefold. The District Court stated that attorneys' fees were awarded because of the exceptional circumstances. Finding No. 71 reads:

> "* * * Said sum, however, is not to be included as an element of damages in the antitrust action to be increased threefold, as defendants would have the Court do. It is to be awarded counsel for the defendants by reason of their representing the successful parties

> in the patent infringement action, and by reason of the exceptional circumstances involved in the case concerning the validity of the patent and its use by the patentee and his licensees, all as found in these findings of fact." [165 F. Supp. 578.]

However, the District Court made no specific finding that the adverse party had been guilty of bad faith, inequitable, or unconscionable conduct "in the case concerning the validity of the patent." These are the usual bases for awarding attorneys' fees in patent cases. Continental Art Co. v. Bertolozzi, 7 Cir., 1956, 232 F.2d 131, 134; Wilson v. Seng Co., 7 Cir., 1952, 194 F.2d 399, 404; Apex Electrical Mfg. Co. v. Altorfer Bros. Co., 7 Cir., 1956, 238 F.2d 867, 874. On the other hand, the District Court's reference to use of the patent by the patentee and his licensees can have reference only to the anti-trust violations. The record of this eight-year long litigation fully supports such a finding, and defendants are entitled to have their reasonable attorneys' fees and expenses included as an element of damages in the antitrust action.

[8] Clapper charges the Trial Judge with error in denying motion under Rule 37(b)(2), Federal Rules of Civil Procedure, to discipline and penalize defendants for alleged failure to comply with the District Court's orders respecting production of documents and discovery under Rule 34. The District Judge gave careful, complete and repeated consideration to this question and, after hearing evidence, found that full discovery had been made.

In listing the contested issues, Clapper includes the following:

> "9. Did defendants' misrepresentations concerning the loss of records by fire and their refusal and failure to comply with plaintiff's request for discovery and with the Trial Court's order for the production of

documents impose undue, unwarranted and unlawful hardship and expense upon plaintiff in making his proofs

"(a) respecting damage allegedly suffered by defendants as charged in their counterclaim;

"(b) respecting the character, purpose and duration of the Original Tractor Cab-Cab-Ette working arrangement in the fall of 1949;

"(c) respecting the breach by defendant Williams of the Clapper Williams contract entered into at the Chicago meeting of September 12, 1949."

However, the issue is not argued in the brief. Defendants, noting that fact in their brief, presume the issue to have been abandoned. The reply brief does not indicate otherwise. Review of the record before us shows the finding of the Trial Judge to be fully supported.

[9] It is Clapper's position that defendants actually proved no damage of which the antitrust violation was a proximate cause. The District Court in this regard found:

"68. The evidence shows direct loss was suffered by the defendant, Original, in salaries, wages and other expenses of shutdown from August 22 to September 23, 1949, in the total amount of $2,561.45. * * *"

"69. The evidence shows that the defendant, Original, had negotiated for financing for continued operation which had to be dropped entirely by the shutdown following the notices sent by the plaintiff in concert with others, in August, 1949, the cost of which to the defendant, Original, was $317.20, which it is entitled to recover.

"70. The evidence shows that the defendant, Original, had expended for advertising the sum of $4,563.70, which was rendered valueless by the forced

shutdown in August, 1949, as a result of said notices of infringement sent to the defendant and to its distributors. * * *

"72. The evidence shows that there has been a direct loss of sales by defendant, Original, to Farm Equipment Sales Co. and Stover-Winsted Co. as a consequence of the notices of infringement sent pursuant to the conspiracy created by the License Agreement of August 3-4, 1948. * * *

"Following the time Stover-Winsted Co. and Farm Equipment Sales Co. stopped doing business with the defendant, Original, the evidence shows that during the years 1949 through the first eleven months of 1956, Farm Equipment Sales Co. purchased from Comfort Equipment Company 9,084 covers. * * *

"74. The losses heretofore stated resulted in damage to the business and property of the defendant, Original, as a consequence of the illegal conspiracy of the plaintiff Clapper, and Flora and their licensees acting in concert. For such damage, defendant, Original, is entitled to recover the following amounts of compensatory damages:

"(1)	Costs resulting from forced stoppage of production, from August 22, 1949, through September 23, 1949.	$ 2,561.45
"(2)	Expenses incurred in finance negotiations.	317.20
"(3)	Advertising costs rendered useless by reason of forced work stoppage.	4,563.70
"(4)	Loss of potential sales to Farm Equipment Sales Co. for the years 1949 through the first eleven months of 1956	12,263.40
"(5)	Loss of potential sales to Stover-Winsted Co. for the years 1949 through	

the first five months of 1952.	7,905.60
"Total	$27,611.35"

Review of the record shows ample support for these findings which cannot be held to have been clearly erroneous.

The total figure of $27,611.35 was trebled under section 4 of the Clayton Act, which brought it to $82,834.05, against which the District Court credited the $110,000 payment made by Flora and the three licensees, leaving a balance in Clapper's favor, which in turn was credited against attorneys' fees of $28,244.31 awarded for defense of the patent infringement suit as an "exceptional" case. As indicated above, in our opinion, this latter sum should have been included in the compensatory damages sustained by defendants as a result of the antitrust violation.

Clapper protests the separate award of attorneys' fees to defendants for prosecution of the antitrust phase of the case, again, on the ground that defendants failed to prove any damage which was the proximate result of the alleged antitrust violation. As indicated above, this Court concurs in the District Court's findings to the contrary.

Clapper also takes issue with the amount of $25,000 attorneys' fees allowed, as grossly disproportionate to the amount of compensatory damages proved—$27,611.35. The District Court arrived at this figure after disallowing the defendants' claim for $141,035.00 as not having a realistic relation to the amount of compensatory damages awarded. The District Court, in this aspect of the case, relied on Milwaukee Towne Corp. v. Loew's, Inc., 7 Cir., 1951, 190 F.2d 561, where this Court reduced attorneys' fees allowed by the Trial Court from about 50% to about 17% of the damages awarded.

The District Court also referred to Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 8 Cir., 1952, 194 F.2d 846. In that case the Court of Appeals considered a fee of 40% of the damages to be such as to (194 F.2d at page 859) "shock the conscience." The Court reduced the fee awarded in the sum of $150,000 to $100,000, including fees on appeal, which was considered to be reasonable after study of the entire record and briefs.

The District Court in the case before us noted that $25,000 was only a little less than the compensatory damages found to have been sustained by defendants, and ventured to say that except for the difficulty of proof, the actual damage suffered as a direct result of the antitrust violation would have been found to be far greater.

Defendants argue that this Court has set down no percentage requirements in the Milwaukee Town case; that we computed fees for experienced trial lawyers in Chicago at $200 per day ($40 per hour for a 5-hour day) plus $20 per hour for assistants to counsel, and thus allowed $75,000, apparently for less than 2000 hours expended. Here defendants' counsel itemized in excess of 3700 hours expended solely on the antitrust action, which does not include time in excess of 100 days expended in the patent infringement aspect of the matter. Defendants point out that the Milwaukee Towne opinion contains a favorable reference to fees of $30,000 awarded for 1300 hours in Bigelow v. R. K. O. Radio Pictures, Inc., 7 Cir., 1945, 150 F.2d 877. In the Bigelow case this Court agreed that the conspiracy had been established but reversed the judgment on the question of damages. The Supreme Court, 1946, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652, affirmed our holding with respect to the conspiracy but reversed our holding as to proof of damages. Defendants also cite Emich Motors Corp. v. General Motors Corp., 7 Cir., 1950, 181,

F.2d 70. There the cause was retried after appeal to this Court and grant of certiorari by the U. S. Supreme Court, 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534. On retrial, the bulk of the claims for damage was found to be barred by the Statute of Limitations, 7 Cir., 1956, 229 F.2d 714. The case is, therefore, of little assistance to us here.

In Milwaukee Towne (190 F.2d at page 571) this Court did say that allowances for services should be determined in the same manner as for those of a trial lawyer in any other kind of a case of comparable magnitude. However, this Court also said that the result might properly be taken into consideration in fixing a reasonable attorneys' fee and that in a case of this character, the result should be measured by the amount of damages found.

Defendants contend that the measure of fees is that stated in Cape Cod Food Products v. National Cranberry Ass'n, D.C.Mass.1954, 119 F.Supp. 242, 244:

> "* * * The rate is the free market price, the figure which a willing, successful client would pay a willing successful lawyer. Sometimes the figure may seem high."

and in Darden v. Besser, 6 Cir., 1958, 257 F.2d 285, 286:

> "While the allowance of reasonable attorneys' fees is always a matter of delicacy * * * the object always, of course, is to allow just and fair compensation for the services rendered, considering the time and skill employed, the experience brought to bear, and the result achieved."

Clapper further disputes the value of counsel's services on another ground. He maintains that counsel's task was made exceptionally easy by the fact that the same proofs needed in the instant case to prove violation of the antitrust

laws and the existence of a conspiracy, had already been made and the issues resolved in the Kansas City case Mason City Tent & Awning Co. v. Clapper, D.C.1956, 144 F.Supp. 754. In that case $5000 attorneys' fees were awarded. Counsel for Mason City, et al. in that case, Clapper adds, was also principal counsel for defendants here Exhibits, interrogatories, pleadings etc. were markedly similar in both cases. Associate counsel in the two cases were not the same, but Clapper argues that their qualifications were much the same. He relies on Bordonaro Bros. Theatres v. Paramount Pictures, D.C.N.Y.1953, 113 F.Supp. 196, where attorneys' fees of $18,000 had been awarded in an earlier trial, but only $4,500 allowed on a second trial, which the Court there held to be substantially less demanding; although proof of continuing conspiracy was required for the second trial.

Defendants in reply point out that when their counterclaim was filed in 1950 and for several years afterward, Original alone was contesting the efforts of Clapper and his co-conspirators to control the market in tractor covers. Counsel for defendants were obliged to meet objections of Clapper and Flora to joining the licensees as cross-defendants, as well as claims of estoppel, *pari delicto* and the like, all of which required briefing, argument and trial. This case was pending for eight years. On the other hand, the Mason City case was not filed until June 11, 1954. Thus the Mason City case, although tried first, was greatly simplified by the discovery and preparation made for this case, rather than the reverse.

[10] Clapper reasons that use of the italicized wording in section 15, Title 15 U.S.C.A., means that attorneys' fees are part of the costs in an antitrust action:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the

antitrust laws * * * shall recover * * * *the cost of suit, including a reasonable attorneys' fee.*"

We cannot agree that attorneys' fees are meant to be thus included as an item of the usual "costs" taxed against the unsuccessful litigant. Clapper further concludes that the attorneys' fees for defendants' counsel are barred for the period up to and including December 14, 1954, the date of the order dismissing Flora and the licensees. That order stated:

> "4. That no costs be awarded to any party litigant designated in this Order, the respective parties litigant bearing their own costs."

Two of the named parties litigant are Original and Williams.

The District Court considered it unreasonable that Clapper should be completely exonerated from payment of all costs and attorneys' fees for a period of time during which he was as much a litigant as at any other time during the long controversy concerning a conspiracy from which he reaped the greatest benefit. However, the District Court specifically stated that the Court was not wholly ignoring Clapper's theory, and in determining a reasonable attorneys' fee, the Court would consider, as a weight factor, the recovery made and the attorneys' fees received in connection with the $110,000 paid by Clapper's co-conspirators.

|11| It appears to this Court that the learned Trial Judge in the exercise of his discretion to set attorneys' fees, in the antitrust action, gave studied attention to all of the pertinent factors impinging on this delicate matter. We find no abuse of discretion in this regard, and conclude that interference with the amount set would be unwarranted in this case.

Clapper also assigns as error the District Court's refusal to consider defendant Williams' alleged breach of a contract made with Clapper. Clapper asserts that on September 12, 1949, in Chicago, after denial of Williams' request for a license, Clapper made an oral agreement with Williams (afterwards confirmed in writing) whereby Williams agreed that Original would discontinue manufacture of the accused device in return for Clapper's permission to dispose of the inventory on hand. Clapper charges that Williams breached this agreement by making an arrangement with one of the licensees, Cab-Ette, to allow continuance of manufacture and sale of the accused device, which was then designated "Original Cab-Ette" and marked with the patent numbers of both the Flora and Clapper patents. Defendants paid a royalty to Clapper on all Original Cab-Ette covers made during the life of this arrangement, which terminated by the end of November, 1949. At that time, defendants changed the designation from "Original Cab-Ette" to "Original Half Cab," and notified Clapper that they were resuming manufacture. It was this action, Clapper says, which led to the filing of the complaint in this case on April 14, 1950.

Clapper contends that defendants' conduct in this connection estops them from denying the validity of the Clapper patent and from asserting violation of the antitrust laws because they had brought themselves under the cloak of the group license of August 3-4, 1948.

As in the case of contested issue No. 9, mentioned above, these propositions are set forth in the list of contested issues in Clapper's brief, but are not included in the argument. In their brief in answer, defendants presume these issues have been abandoned. Clapper does not contradict that presumption in his reply brief, although he includes the following in his "conclusions":

"3. That when defendants could not obtain a license under plaintiff's patent through legitimate channels they breached an agreement with plaintiff to discontinue infringement and negotiated a clandestine arrangement with one of plaintiff's licensees, the Cabette Co., in order to continue in business under the pale of plaintiff's patent rights."

[12] The District Court did not refuse to consider these issues. We need not labor the point; it is sufficient to quote the District Court's findings:

"35. The spokesman for the several parties to the Agreement of August 3-4, 1948, upon rejecting the application of the defendants for a license under the Clapper patent, in the meeting on September 12, 1949, informed the defendants that the defendant, Original, would be given a limited period of time within which to dispose of its stock of tractor covers then in course of manufacture and that if the defendants then ceased the manufacture of tractor covers, no action for patent infringement would be instituted. The evidence does not establish that an agreement was reached between the plaintiff and defendants in that meeting in Chicago on September 12, 1949, or subsequently. Any proposals made to the defendants in that meeting were in furtherance of a conspiracy in violation of antitrust laws. * * * Plaintiff has alleged and relies upon the theory that a contract was entered into between the defendants and the several parties to the Agreement of August 3-4, 1948, and that he, plaintiff Clapper, has been damaged as a result of the breach of said contract on the part of the defendants. There is no evidence in the record of damages to the plaintiff flowing from the alleged breach, even if it were assumed that an agreement was reached, which the court does not find.

"36. Thereafter, the defendants entered into a working arrangement with Cabette, formed for the use of the Original facilities to manufacture parts of

tractor covers for Cabette, which working arrangement became effective the latter part of October, 1949. A proposed contract to formalize the working arrangement was reduced to a writing dated November 4, 1949. Before the execution thereof by both parties, disagreement arose, and the proposed contract was not executed. The working arrangement was terminated by mutual consent. A proposed settlement contract dated November 23, 1949, was prepared. Before the execution by both parties, a controversy arose, and the contract was unexecuted by both parties.

"37. The defendants prior to the filing of this action by the plaintiff, had no knowledge of the terms and provisions of the License Agreement of August 3-4, 1948, except with respect to the place of manufacture of the tractor covers with the permission of Clapper.

"38. The defendants discontinued the manufacture and sale of the Original products and entered into a working arrangement with Cabette. This arrangement was made in order to afford Cabette the working facilities of Original whereby Original could manufacture parts for Cabette, and at the same time, it was a means of keeping Original in operation.

"39. During the working arrangement between Cabette and the defendants, the defendants notified the plaintiff that they were discontinuing the manufacture and sale of tractor covers in accordance with the direction by the spokesman for the group at the meeting in Chicago, as aforesaid, on September 12, 1949, which notice was retracted, however, after the discontinuance of the working arrangement with Cabette in November, 1949.

"40. During the working arrangement with Cabette, the defendants operated only as suppliers for Cabette by direction of the latter and did not thereby become licensees under the Clapper patent nor parties to the conspiracy; whereby the defendants are not

estopped from contesting the validity of the Clapper patent nor from claiming damages for violation of the antitrust laws, according to the first cause of action of the amended complaint."

[13] Lastly Clapper urges that the District Court erred in awarding defendants costs in this action. Clapper attributes the major portion of the costs to the period of the venue dispute concerning the cross-defendants, in which he alleges he had no interest. Further he relies on the terms of the order of dismissal following the settlement between Flora, the licensees, and defendants, whereby the District Court directed that the respective parties litigant bear their own costs. Clapper's position is that this is the law of the case up to the date of that order (December 14, 1954) and that he had a right to rely on it to free him from costs which he otherwise would have shared with Flora and the three licensees.

The District Court found Clapper to have been as much a litigant to the venue issue, involving his co-conspirators (and the appeal taken therefrom) as at any other time, and held Clapper not to have been relieved by the order of December 14, 1954, from payment of a just portion of the costs during the venue litigation. The District Court considered the costs in detail and disallowed a great bulk of the defendants' original bill of costs.

Here, and in the District Court, Clapper raised objections to the item of $744.44 paid for carbon copy of transcript of the main trial. The District Court found that it was a custom of long standing, in that Court, that in any case where a party ordered a transcript of evidence, the original must be furnished to the Trial Judge and the expense of same borne by the party ordering the transcript or as the Court otherwise directs. In view of the complexity of the case, the District Court thought it was

reasonable for counsel to have a transcript of the evidence and minutes of trial, plus one copy for use in conduct of the trial and post-trial procedures. The District Court disallowed reporter's fees and charges for transcript of oral arguments.

Clapper also objects to costs for photostats which are unidentified. When this objection was addressed to the Trial Judge, the latter indicated regret that an itemized list had not been kept identifying each document with an explanation of its use. The Trial Judge said that ordinarily he would sustain the objection, but that in this case, the judge himself personally recalled many conferences and informal agreements among counsel with respect to furnishing copies of documents, and, as this was a matter within the Court's judicial discretion, and the amount of $207.98 was also supported by oath of counsel, he allowed that sum as costs. In view of all the attendant circumstances, we cannot say that there was an abuse of discretion with respect to allowance of costs.

Defendants' position is that the District Court erred in awarding inadequate damages. They ask that this cause be remanded for recomputation of the damages to include losses from potential sales and losses attributable to the arrangement with Cab-Ette. Defendants cite a number of cases to support their contention that losses of profits may be determined by the calculations of a certified public accountant according to proper accounting practices. None of these cases involved the precise method of calculation used here. The District Court describes defendants' method as follows:

> "* * * Briefly and generally, the theory of the defendant, Original, as explained by its president, Williams, and its accountant, Morgan, involved the process of taking the number of dealers the defendant, Original,

had prior to the summer of 1949, at which time it changed its sales methods from dealers over to distributors. Williams explained he was very careful in making his calculations in order to stay on the conservative side. In his survey of existing dealers he found there were 901 dealers listed. But of the 901 listed dealers he could find only 684 cards showing actual sales to such dealers. Therefore in his calculations he used the figure of 684 dealer cards as the basis from which to test the average potential sales to the established dealers. Among the 684 dealers, he found that 336 had sent orders in and had purchased half Cabs. The 336 dealers purchased 1,275 half Cabs. By taking the number of purchases of half Cabs and relating them to the number of dealers who had actually purchased half Cabs, he found that the company sales amounted to three and eighty hundredths half Cabs per dealer. By relating the company sales of half Cabs to all of its dealers, he found that the company's average sales of half Cabs per dealer amounted to 1.86 half Cabs.

"After the establishment of the distributorships, Williams made a survey in order to determine the total number of dealers served by the distributors. It was found that the distributors serviced 17,450 dealers. Commencing with the year 1949, the first year defendant, Original, had distributors, and the first year of the impact of the conspiracy, the defendant, Original, estimated the sale of one unit to each dealer served by its distributors. Thus, it estimated its potential sales for the year 1949 at 17,450 units. Taking the year 1950 as the base year and applying the annual percentage growth in tractor population in the United States and applying such percentages of tractor population growth to the subsequent years to and including the year 1956, and by applying the estimated unit sales per dealer of 1.86, defendant thereby arrived at the respective total unit potential sales for the years 1950 through 1956. * * *

"By eliminating what defendants' accountant determined to be abnormal operating expenses by reason of the impact of the conspiracy and the attendant litigation, the accountant arrived at an adjusted net unit profit per half Cab. By further applying the estimated unit potential sales as estimated by Williams according to his estimated sales per dealer as related to tractor population growth, defendant established a different and higher net unit profit through the commensurate savings in overhead costs per unit due to the greater estimated production. By applying the greater net unit profit to the respective annual estimated potential sales, the accountant arrived at the total dollar profits which defendants claim could have been realized on potential sales except for the impact of the conspiracy for the period 1949-1956, which amounted to $1,364,200.10. From this was deducted the actual profit realized from sales of half Cabs as reflected by the accountant's pro-forma earnings statement adjusted to eliminate the abnormal effects of the conspiracy and litigation. The realized profits from actual sales of half Cabs during the period amounted to $79,996.17. Subtracting the realized profits from the total estimated profits, the accountant arrived at the figure of $1,284,203.93, which the defendants claim represents the total profits that could have been realized on the estimated potential sales except for the antitrust violations by plaintiff Clapper, together with Flora and their licensees." [165 F.Supp. 580.]

In American Cooperative Serum Ass'n. v. Anchor Serum Co., 7 Cir., 1946, 153 F.2d 907, 914, the District Court based judgment on the evidence of a certified public accountant who tabulated each of plaintiff's sales made at 65 cents (to meet unfair price-cutting) and also calculated the amount of each item had it been sold at 75 cents. The difference between the two totals was the amount on which judgment was based.

[14] Central Coal & Coke Co. v. Hartman, 8 Cir., 1901, 111 F. 96, concerned a "club" formed to control the price of coal in Kansas City, Kansas, and Kansas City, Missouri. When plaintiff withdrew from the "club" his former associates refused to sell to him except at prices only 50 cents per ton less than that established for retail sale to consumers. In that case the Court of Appeals reversed a judgment for plaintiff on the ground that speculations, guesses and estimates of witnesses were insufficient bases for recovery. The Court mentioned (111 F. at page 98) "* * * the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. (citing cases)." The Court then set forth the exception to the general rule: that loss of profits from the interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was.

Kiefer-Stewart Co. v. Joseph Seagram & Sons, 1951, 340 U.S. 211 71 S.Ct. 259, 95 L.Ed. 219, involved an agreement among competitors in interstate commerce to fix maximum resale prices of their products. When plaintiff refused to subscribe to that policy, his name was struck from the list of authorized distributors. The opinion of the Supreme Court does not touch on the method of computing damages but deals solely with reversing this Court's decision that a violation of the Sherman Act had not been proved. In the opinion of this Court, reported at 7 Cir., 1950, 182 F.2d 228, the method of computing damages was never reached. Study of the briefs in the Kiefer case indicates that the primary objection to testimony of the accountant was that his evidence was based on hearsay in that certain books and records were not in evidence. He testified as to the actual dollar volume of sales during 1946, 1947, 1948 and the first quarter of 1949. He then testified

to costs and expenses based on actual experience which Kiefer would have incurred had it realized, in 1947, 1948 and the first quarter of 1949, the additional volume of sales necessary to bring its actual sales to the level 1946. He also testified to the resulting percentage of profi to sales and resulting total amount of profit which would have been realized on such additional volume of sales. The accountant was employed by a firm which had audited Kiefer's books for more than twenty years. There had been a showing that the books and records were voluminous in character. A member of the corporation and the auditor testified to the accuracy of the books and records. In spite of the burden involved, Kiefer's counsel had twice offered to produce the books in court. The District Court refused to permit proof that only one-third of the drop-off in sales volume was attributable to a general statewide decline in the volume of wholesale business after 1945, such proof being based only on check of the Indiana Alcoholic Beverage Commission's figures on liquor stamp sales.

In William H. Rankin Co. v. Associated Bill Posters of U. S., etc., 2 Cir., 1930, 42 F.2d 152, the Trial Court permitted the Treasurer to show by his compilations, based on net profits of the business in 1911 and his knowledge of business conditions when free of the defendants' unlawful interference, what he considered would have been the probable yearly earnings from July 1913 to June 30, 1918; and to explain how he arrived at his figures. The Court of Appeals said that whatever might be said of the weight of the testimony, that was entirely for the jury.

The Trial Judge sitting as jury in the case before us weighed the evidence adduced by defendants and found their theory of computing estimated potential sales to be unrealistic. The Trial Judge noted (*inter alia*) that the theory assumed each of the distributors and dealers would

continuously handle and sell the product throughout the years involved, although one firm included in the list of dealers discontinued the sale of tractor cabs in 1952 or 1953. It also assumed climatic conditions and the absence of peaks and valleys in annual sales, which the Trial Judge said was inconsistent with the actual experience of defendants' competitors.

In Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 8 Cir., 1952, 194 F.2d 846, Brookside Theatre Corp. charged that it had been driven out of business and had been forced to turn over its theatre to one of the defendants. The Trial Court admitted evidence of a certified public accountant who had examined the books produced by defendants to show the operations and profits of the theatre after the sale by Brookside.

In Eastman Co. of New York v. Southern Photo Co., 1927, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684, the Court found that there was substantial evidence to show that prior to 1910 Southern Photo Co. had an established business in selling to professional photographers supplies largely purchased from Eastman. Southern also took on a non-conflicting line of goods for amateurs. When, because of the monopoly, Southern was no longer able to supply professionals, it lost most of its established trade in such goods, although the business was so organized that Southern would have been able to handle Eastman's goods with no increase in its general expenses and no additional cost except that incident to handling such goods themselves. Plaintiff sought to recover, as loss of profits, the amount of its gross profits on Eastman's goods during the four years preceding the period in suit, which was shown, less the additional expense (which was estimated) which would have been incurred in handling defendant's goods during the four year period in suit.

Eastman objected to this use, as a standard, of profits earned during the four years Southern had been Eastman's customer, on the ground that Southern had participated in Eastman's unlawful acts and was in *pari delicto*. However, there was evidence from which the jury could have concluded otherwise, and uncontradicted, affirmative evidence that under Eastman's restricted terms of sale, the dealers' profits did not exceed those on sale of goods of other manufacturers not parties to the monopoly.

In Story Parchment Co. v. Paterson Co., 1931, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544, three companies maintained uniform prices and enjoyed a substantial monopoly of the interstate trade in parchment paper. The Trial Court submitted two items of damage for the consideration of the jury: (1) the difference, if any, between the amounts actually realized by Story and what it would have realized from sales at reasonable prices but for the acts of the defendants and co-conspirators; and (2) the extent to which the value of Story's property had been diminished by such acts. The Court there found that there was evidence from which the jury could have found that, in pursuance of the conspiracy, goods had been sold below the point of fair profit and below cost of production. In that case, the evidence also included a detailed showing that current prices were higher during a period antedating the unlawful combination, and that there had been price cutting afterward. The Court held that it was fair to say that the natural and probable effect of the combination and price cutting would be to destroy normal prices. Story put in evidence of prices received before and after. The Court said that while damages may not be determined by mere speculation or guess, it was sufficient if the evidence showed the extent of the damages as a matter of just and reasonable inference, although the result was only approximate.

[15] We agree with the District Court that defendants' theory of computation, as described above, does not meet the standard of "just and reasonable inference."

In Bigelow v. R. K. O. Radio Pictures, 1946, 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652, to demonstrate the damages suffered from a discriminatory system of motion picture showings, petitioners introduced a comparison of earnings, during a five year operation of their own theatre with earnings, during the same period, of one of respondents' theatres (comparable in size, but inferior in location, equipment, and attractiveness to patrons) which had been allowed to exhibit pictures ahead of petitioners. Other evidence dealt with petitioners' operation during a period when it had been able to find and show some films which had not been selected by respondents' theatres and thus had not been previously shown there. This period was contrasted with operations after the practice of showing double-features made it almost impossible to find any films which had not been selected for previous showing in respondents' theatres. The Supreme Court found these two classes of evidence not to be mutually exclusive, and the Court further held that the evidence of damage was sufficient to support the jury's verdict. Here, too, the Court said (327 U.S. at page 264, 66 S. Ct. at page 579) "* * * even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." That is what the District Court did in the case before us.

It appears to us, as it did to the District Court, from a study of the record, that there is no preponderance of evidence to show that Clapper (and his licensees) through any conspiratorial act caused the losses arising out of the working arrangement with Cab-Ette.

In view of the position we have adopted with respect to the issues discussed, it would only unduly lengthen this opinion to comment in detail on other arguments, advanced by counsel for both parties, which were considered by this Court.

The judgment of the District Court is affirmed in all respects except as to failure to include attorneys' fees and expenses incurred in the patent infringement defense as an element of damages in the antitrust action. As to that aspect of the case only, the judgment is reversed and the cause is remanded for entry of order in conformity with this opinion.

In part affirmed.

In part reversed and remanded with directions.

PARKINSON, Circuit Judge (concurring in part and dissenting in part).

I concur in that part of the result reached by Judge KNOCH in his opinion which affirms the judgment of the District Court. However, I am compelled to respectfully dissent to that portion of the opinion reversing for failure to include attorney fees and expenses incurred by counsel for Original in the defense of the patent infringement phase of the case as an element of treble damages in the antitrust action under the counterclaim.

The District Court made the award under authority of 35 U.S.C.A. § 285 by reason of the *exceptional* circumstances involved in the case concerning the validity of the patent and its use by Clapper and his licensees but specifically declined to include the award as an element of damages in the antitrust action under the counterclaim.

15 U.S.C.A. § 15 provides that one who shall be injured in his business or property by reason of anything forbidden

in the antitrust laws shall recover threefold the damages sustained by him, plus the cost of suit including a reasonable attorney's fee.

It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. Kepner v. United States, 1904, 195 U.S. 100, 124, 24 S.Ct. 797, 49 L.Ed. 114, or, as stated by the Supreme Court in another way: "where words are employed in an act which had at the time a well known meaning in the law, they are used in that sense unless the context requires the contrary." Case v. Los Angeles Lumber Co., 1939, 308 U.S. 106, 115, 60 S.Ct. 1, 7, 84 L.Ed. 110.

When 15 U.S.C.A. § 15 was enacted by Congress, the word "damages" had acquired, through judicial interpretation, a well understood legislative meaning and it did not include attorney fees incurred in defending civil actions. Oelrichs v. Spain, 1872, 15 Wall. 211, 82 U.S. 211, 231, 21 L.Ed. 43; Flanders v. Tweed, 1872, 15 Wall. 450, 82 U.S. 450, 453, 21 L.Ed. 203; Tullock v. Mulvane, 1902, 184 U.S. 497, 511, 22 S.Ct. 372, 46 L.Ed. 657. Missouri, Kansas & Texas R. Co. v. Elliott, 1902, 184 U.S. 530, 539-540, 22 S.Ct. 446, 46 L.Ed. 673; Straus v. Victor Talking Mach. Co., 2 Cir., 1924, 297 F. 791, 797. There is nothing in the Act to the contrary, and, in my opinion, any legal basis for an attorney fee allowance in the successful defense of the patent infringement phase of this action could emanate from and find its source only in 35 U.S.C.A. § 285.

As I read the case of Kobe, Inc. v. Dempsey Pump Co., 10 Cir., 1952, 198 F.2d 416, I am impressed with the thought that the question of the right to include counsel fees incurred in the successful defense of a patent infringement

suit as an element of damage in an antitrust action was not squarely raised and decided by the Tenth Circuit, although the District Court so held. However, if the Tenth Circuit did so decide, I am constrained to disagree and am of the opinion that the Second Circuit was correct in its decision in Straus v. Victor Talking Mach. Co., 297 F. 791.

The District Court made an award of $25,000 for the services of counsel for Original in the antitrust action under its counterclaim pursuant to 15 U.S.C.A. § 15 and made an award of $28,244.31 for the services and expenses of counsel for Original in the defense of the patent infringement action under the complaint pursuant to 35 U.S.C.A. § 285. I am convinced the refusal of the District Court to include the latter award as an element of treble antitrust damages is not erroneous under the circumstances here.

I would affirm the judgment of the District Court in its entirety.

EXHIBIT C.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff. v. BEARING DISTRIBUTORS COMPANY ET AL., Defendants.	CIVIL ACTION No. 6895.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on April 27, 1951, Comfort Equipment Company, a corporation, formerly Bearing Distributors Company, having been made a party defendant herein, and the defendants having appeared and filed their answers to said complaint denying the substantive allegations thereof; and the plaintiff and said defendants, by their respective attorneys, having severally consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect of any such issue,

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon consent as aforesaid of all the parties hereto,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

This court has jurisdiction of the subject matter hereof and of all parties hereto. The complaint states a cause of action against the defendants under Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", as amended, commonly known as the Sherman Act.

II

As used in this Final Judgment:

(A) "Person" means an individual, partnership, firm, association, corporation or other legal entity.

(B) "Tractor cabs" means an accessory or device for a tractor or similar machinery, made of canvas or similar material, and sometimes designated as a heating unit, which when affixed or fastened to a tractor, or similar machinery, provides an enclosed space in which the driver of the tractor, or similar machinery, is heated and protected from the weather.

(C) "Patents" means United States Letters Patent and applications therefor, all reissues, continuations, divisions or extensions thereof and patents issued upon said applications, relating to tractor cabs.

III

The provisions of this Final Judgment applicable to any defendant shall apply to such defendant, its successors, subsidiaries, assigns, officers, directors, agents, employees, and to those persons in active concert or participation with them who receive actual notice of this Final Judgment by personal service or otherwise. For the purpose of this Final Judgment any defendant and a wholly-owned subsidiary thereof shall be considered as one person.

IV

(A) Each defendant is ordered and directed, in so far as it has or may acquire the power or authority to do so, to grant to any applicant making written request therefor, a license to manufacture, use and sell tractor cabs under United States Patent No. 2,452,834 and Patent No. 2,461,974 and any other patent relating to tractor cabs issued to or acquired by any such defendant within five years from date hereof, such license to be for the full unexpired term of the patent or patents. Said licenses shall contain no restrictions whatsoever except that:

(1) The license may be nontransferable;

(2) A uniform, reasonable and nondiscriminatory royalty may be charged upon any license issued;

(3) Reasonable provisions may be made for periodic inspection of the books and records of the licensee by an independent auditor or by any person acceptable to the licensee who shall report to the licensor only the amount of the royalty due and payable;

(4) Reasonable provision may be made for cancellation of the license upon failure of the licensee to pay the royalties found to be due and payable or to permit the inspection of his books and records as hereinabove provided;

(5) The license must provide that the licensee may cancel the license at any time by giving ninety days' notice in writing to the licensor;

(6) The license or sub-license must provide that the licensee shall immediately have the benefit of any more favorable terms granted any other licensee.

(B) Upon receiving any application for a license in accordance with the provisions of this Section IV, the de-

fendant shall advise the applicant of the royalty it deems reasonable for the patent or patents to which the application pertains. If the parties are unable to agree upon what constitutes a reasonable royalty within sixty (60) days from the date the application for the license was received by the defendant, the applicant therefor or the defendant may forthwith petition this Court for the determination of a reasonable royalty, and the said defendant shall, upon receipt of notice of filing such petition, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be upon the defendant to establish the reasonableness of the royalty requested by it; and the reasonable royalty rates, if any, determined by the Court shall apply to the applicant and to all other licensees under the same patent or patents. Pending the completion of negotiations or of any such Court proceedings, the applicant shall have the right to make, use and vend under the patent or patents to which its application pertains, without payment of royalty or other compensation, but subject to the following provisions: The defendant may petition the Court to fix an interim royalty rate pending final determination of what constitutes a reasonable royalty, if any. If the Court fixes such interim royalty rate, the defendant shall then grant, and the applicant shall accept, a license providing for the periodic payment of royalties at such interim rates from the date of the making of such application by the applicant. If the applicant fails to accept such license or fails to pay the interim royalty therein provided, such action shall be ground for the denial or dismissal of his application. Where an interim license has been issued pursuant to these provisions, reasonable royalty rates, if any, as finally determined by the Court shall be retroactive for the applicant and all other licensees under the same patent or patents to the date the applicant filed his application for a license.

(C) Nothing in this Final Judgment shall prevent any applicant for a license from attacking in any proceeding or controversy the validity or scope of any of the patents subject to this Final Judgment nor shall this Final Judgment be construed as importing any validity or value to any such patent.

V

The defendants are jointly and severally enjoined and restrained from making any disposition of any of the patents or patent applications subject to Section IV of this Final Judgment, or any rights with respect thereto, which deprives such defendant of the power or authority to grant licenses as hereinbefore provided for in Section IV, unless the defendant requires as a condition of such disposition that the purchaser, transferee, assignee or licensee, as the case may be, shall observe the requirements of Sections IV and V hereof, as applicable, and such purchaser, transferee, assignee or licensee shall file with this Court, prior to the consummation of said transaction, an undertaking to be bound by said provisions of this Final Judgment.

VI

Defendants are jointly and severally enjoined and restrained from instituting any proceeding, judicial or administrative, for infringement of any of the patents to which Sections IV and V of this Final Judgment may apply alleged to have occurred prior to the date of the entry of this Final Judgment.

VII

The defendants are jointly and severally enjoined and restrained from, in any manner, granting to any other person, any power or authority, whether by contract, agreement or otherwise, to hinder, restrict, limit or pre-

vent such defendant from granting a license under any patent or patents owned or controlled by such defendant to any person.

VIII

That certain contract dated August 3, 1948 entered into by and between Lee Flora, Clyde E. Clapper, Michael A. Halligan, Cab-Ette Company, a corporation, Fort Dodge Tent and Awning Company, a corporation, and Bearing Distributor Company, a corporation, to the extent, if any, that the same may still be in force and effect, is hereby declared to be cancelled, null and void, and the defendants are jointly and severally enjoined and restrained from renewing, adhering to, maintaining or continuing, or claiming any rights under, any of the provisions thereof.

IX

(A) The defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining, furthering or enforcing, directly or indirectly, any combination, conspiracy, contract, agreement, understanding, plan or program with any person to fix, establish, or determine the prices, or the terms or conditions relating to prices, for the sale of tractor cabs to any third person;

(B) The defendants are jointly and severally enjoined and restrained from entering into, adhering to, maintaining, furthering or enforcing, directly or indirectly, any combination, conspiracy, contract, agreement, understanding, plan or program with any other defendant or any manufacturer of tractor cabs to allocate or divide territories, markets, dealers or distributors for the manufacture, distribution or sale of tractor cabs.

X

The defendants Clapper and Flora are ordered and directed within sixty days after the entry of this Final Judgment to send a copy of this Final Judgment to each of their present licensees under any patent or patents to which Section IV of this Final Judgment may apply and to each applicant who has, in writing, heretofore applied for and has not received a license to manufacture, use or sell tractor cabs under any such patent or patents. In the case of applicants who may apply for a license to make, use or sell tractor cabs pursuant to Section IV of this Final Judgment, a copy of this Final Judgment shall be sent promptly to each such applicant immediately after receipt of any such application. Each defendant, not a patentee, shall upon inquiry from an applicant for a license, advise the applicant to whom the application should be addressed, if known.

XI

Nothing contained in this Final Judgment shall prevent the defendants from availing themselves of the benefits, if any, of the Act of Congress of July 14, 1952, commonly known as the McGuire Act, or of the Act of Congress of 1937, commonly known as the "Miller-Tydings proviso to Section 1 of the Act of Congress of July 2, 1890 entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies'".

XII

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any

defendant, made to its principal office, be permitted (1) access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment, and (2) subject to the reasonable convenience of said defendant and without restraint or interference from it to interview officers or employees of said defendant, who may have counsel present, regarding any such matters, and (3) upon such request the defendant shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section XII shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of such Department, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

XIII

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, and for the purpose of enforcement of compliance therewith and the punishment of violations thereof.

s/ Albert L. Reeves
United States District Judge

Dated: October 27, 1953

EXHIBIT D.

MASON CITY TENT & AWNING COMPANY, Waterloo Tent & Awning Company, Mankato Tent & Awning Company, Plaintiffs,

v.

Clyde E. CLAPPER, Robert D. McCarthy, Comfort Equipment Company, Burch Manufacturing Company, Inc., Defendants.

No. 9178.

United States District Court,
W. D. Missouri, W. D.

Aug. 24, 1956.

Action to recover damages for alleged conspiracy to pool patents and limit the granting of licenses by patentees in restraint of interstate commerce, and attempt to establish a monopoly in restraint of such commerce to the damage of the plaintiffs. The United States District Court, Ridge, J., held that agreements with restraint to pooling of patents and restricting licenses thereof violated the Sherman Act for which plaintiffs could assert a claim for damages under the Clayton Act, if as result of alleged conspiracy they were prevented from continuing in business and that the amercement of plaintiffs as infringers in other litigation did not prevent them from claiming damages for any impact of conspiracy because of refusal of a license as a result of conspiracy.

Judgment in accordance with the opinion.

144 F. Supp. 754

Swecker & Mathis, Washington, D. C., Margolin & Kirwan, Kansas City, Mo., for plaintiffs.

Thomas E. Scofield, Kansas City, Mo., for Clyde E. Clapper.

Madden & Burke, Kansas City, Mo., for Robt. D. McCarthy and Comfort Equipment Co.

Rudolph L. Lowell, Des Moines, Iowa, for Burch Mfg. Co., Inc.

RIDGE, District Judge.

Stripped of superfluous verbiage and collateral issues, this private Sherman Act, 15 U.S.C.A. § 1 et seq., case finds its existence in the following factual background: Mason City Tent & Awning Company and Mankato Tent and Awning Company are respectively corporations existing under the laws of the State of Iowa and State of Minnesota. Waterloo Tent & Awning Company was incorporated under the laws of the State of Iowa. Prior to the bringing of this action, it appears that corporation was dissolved on November 30, 1950. Charles W. Gasswint is and was the owner of all the capital stock of said corporations and at all times herein mentioned was the chief managing officer thereof. The business of said corporations, prior to 1948, was generally restricted to the manufacture, processing and sale of awnings, tents, tarpaulins and other canvas goods. In 1948 said corporations, under the circumstances hereinafter related, entered the field of manufacturing tractor covers designed to deflect the heat of tractors around the operator thereof in addition to other articles produced by them.

In 1945 the defendant Clyde E. Clapper, and Lee Flora, separately, claimed invention to a tractor cover for deflecting heat around the operator of a tractor, and each filed separate applications for a patent thereon. In 1946 Michael A. Halligan made claim to a like invention and filed an application for a patent thereon. During the

pendency of said three patent applications, the Patent Office declared interference between all three of them and also declared separate interference between the Flora and Halligan applications. While his application for patent was pending, Clapper granted a license to Bearing Distributors Company to manufacture and sell his invention. Later, that Company's corporate name was changed to Comfort Equipment Company, a defendant herein, and hereinafter will be referred to as "Bearing" or "Comfort". Flora likewise granted a license to Cab-Ette Company, of Danville, Illinois, hereinafter referred to as "Cab-Ette"; and, Hailligan granted a license to Fort Dodge Tent and Awning Company, which later changed its name to Burch Manufacturing Company, Inc., a defendant herein and hereinafter referred to as "Fort Dodge" or "Burch". After licenses were granted to the above corporations, Comfort began manufacturing and selling tractor covers in May, 1945; and, Cab-Ette and Burch began like operations in 1946.

In April of 1948, after declaration of the aforesaid interferences, representatives of the above-named three licensees, the three above-named inventors, and their respective attorneys, met in Chicago, Illinois, in an effort to settle their differences with respect to priority of invention. At the outset of said meeting it was agreed by all parties present that each of the licensees under the then pending applications for patent would have a right to a license under each patent application then pending, and thereafter if letters patent were granted thereon; * * * this before the date of invention was disclosed at that meeting by the three inventors, or their respective representatives there present. Thereafter, at said meeting, evidence of priority of invention was adduced and discussed by the parties, as was the question of royalties

to be paid by the prospective licensees. At the conclusion of the meeting, though specific agreement was not reached thereon, it was generally understood that Clapper had rightful claim to priority of invention to the basic unit of a tractor heat deflector; that Flora had priority of invention as to the part thereof which surrounded the operator; and that if Halligan had any claim respecting such an invention it was minimum. The parties being unable to settle at that meeting the question of priority and amount of royalty to be paid by the proposed licensees, the meeting was concluded with agreement that another meeting be held by the interested parties, or their representatives, to formulate specific agreements regarding the above-mentioned matters. Later, two other such meetings were held in St. Louis, Missouri, at which the interested parties, or their representative, attended. At these meetings in St. Louis, Missouri, various topics, such as priority of invention, amount of royalty to be paid, the establishment of a "Litigation Fund", costs of manufacture, and the selling price per unit of tractor cabs, and other related subjects were discussed. From the conferences had at said meetings, and correspondence later passing between the interested parties, a final meeting was agreed to be held at Des Moines, Iowa, on August 3-4, 1948. At that meeting, "Priority Award Agreements" were consummated by the three inventors whereby Clapper was awarded priority of invention on the counts involved in the three-way interference proceedings, and Flora was awarded priority of invention on the counts involved in the two-way interference. Thereafter, on November 2, 1948, Clapper was duly granted letters patent. Flora was granted letters patent on February 15, 1949. Halligan received no letters patent on his application.

At the meeting in Des Moines, Iowa, the interested parties also agreed upon the terms of and duly executed a "License Agreement" respecting the subject matter of the then pending patent applications. By said license agreement, Clapper's and Flora's priority of invention was recognized. Cab-Ette, Fort Dodge and Bearing were each granted a separate license to manufacture and sell heating units embodying the Flora and Clapper inventions, subject to the following conditions, so far as here pertinent: (1) that the licensees manufacture such heater units "at their respective addresses and in no other place or places; except upon written consent" of the owner of the patents; (2) that the licensees pay Clapper $1.00 "as a royalty fee on each and every unit sold and shipped by them" and pay a proportionate royalty on parts; (3) that Flora receive a 24¢ royalty fee on each and every unit sold by licensees, and also a "proportionate royalty" on parts, the same as Clapper; (4) that if any party to the agreement made, or became the owner of, any "improvements in said heating units" then Cab-Ette Fort Dodge and Bearing could manufacture and sell the improvements without paying any further royalty, except as set forth in paragraph 13 of the agreement; (5) that Flora and Clapper would not grant any license under any patent that may be issued to them respectively, "or any other patents that might fall within (the) license agreement, without first obtaining the written consent thereto of the remaining parties to (the) agreement," and each of the licensees agreed not to grant any sublicenses, or any license on "any other patent that might fall within (the) license agreement, without . . . the consent thereto of the remaining parties"; (6) Flora and Halligan agreed to "file applications for Canadian patents on the subject matter of their respective U. S. patent applications" and Clapper and Flora granted licensees the

right "to manufacture and sell heating units under their respective Canadian patent applications then on file or to be filed"; (7) that if any patent was issued on the "Halligan application" or "any improvement made by Halligan relative to the subject matter of his application" then Bearing and Cab-Ette would have an option "to take a license under such patent" and pay royalties therefor "on equal terms with Fort Dodge"; (8) Sections 13, 14 and 15 of said license agreement read as follows:

"13. In the event any of the claims included in patents that may be issued on said Flora, Clapper or Halligan application, or any patents issued covering any improvements thereon, are infringed or in the event any party to this agreement is sued for infringement for the manufacture of heating units under said patents, then any party to this agreement having knowledge of such infringement or any party to this agreement who is sued for infringement shall send written notice thereof to the remaining parties and within a reasonable time thereafter, not to exceed twenty days, all of the parties hereto agree to discuss said infringements for the purpose of arriving at a mutually agreed upon procedure for their disposition.

"14. To prosecute infringers and defend against infringement, the parties hereto agree to set up a litigation fund of $8,000.00 in the following manner: coincident with the execution of this agreement, Clapper shall pay into the said fund $3,000.00 and Cab-Ette, Fort Dodge and Bearing the sums of $1,000.00 each; that Cab-Ette, Fort Dodge and Bearing shall pay into said fund the additional sum of 5¢ on each heating unit sold by them, respectively, from and after the 1st day of August, 1948, and said Clapper shall pay into said fund the sum of 5¢ for each $1.00 royalty by him received from and after the 1st day of August, 1948, until the fund amounts to $8,000.00.

That if at any time during the life of this agreement said fund shall be depleted to the sum of $6,000.00, then in any such event, the said parties hereto shall again contribute to said fund at the rate of 5¢ per unit as hereinabove in this paragraph provided, until said fund shall again amount to the sum of $8,000.00. The monies to be paid into said fund as above provided shall be paid to Clapper, who shall deposit and hold the same in trust in the Commerce Trust Company of Kansas City, Missouri, for the prosecution of infringers and the defending against infringement of any patents because of the manufacture by Cab-Ette, Fort Dodge, or Bearing of heating units under the above recited patent applications, or patents issuing therefor, or any future patents that may fall within the terms of this agreement. That said funds are to be used for the prosecution of infringements of any of said patents only upon the approval of a majority of the parties to this agreement. That said fund shall also be used to defray the expense that may be necessarily incurred in the investigation of claimed infringements and the necessary correspondence, negotiations and the giving of legal notice of infringement to infringers. That in the event any of the parties to this agreement shall claim an infringement materially affecting their business and shall have given notice thereof to the other parties hereto as provided in paragraph numbered 13 hereof, and a majority of the parties hereto agree that such claimed infringement should be prosecuted, then such prosecution shall be instituted within ninety days, but if a majority of the parties hereto shall fail to give their approval to the prosecution of such an infringement within a period of ninety days after the giving of such notice, then in that event, such party hereto claiming to be materially affected as aforesaid shall have the right and privilege at its own expense to prosecute such infringement without any claim to any of the monies in the said fund in this paragraph provided for, unless such prosecution shall have been

finally resolved in favor of the complainant, in which event said complainant shall be entitled to be reimbursed from said fund for their expense incurred in the prosecution of such infringement. That in the event a majority of the parties agree to the prosecution of any infringement, or to undertake the defense of any claimed infringement by any of the parties hereto, that in any such event, the owner of the patent being infringed shall, and with the aid and advice of the remaining parties hereto if he so chooses, select and engage required counsel. That Clapper shall render unto Cab-Ette, Fort Dodge, and Bearing upon request an itemized statement of all sums, if any, withdrawn from said fund accompanied by a copy of the bank statement thereof. That the liability of Flora, Clapper, and Halligen (sic.) to prosecute infringements or to defend against infringements shall be limited to the monies in said fund in this numbered paragraph provided for. Upon the termination of this agreement by expiration of the patents issued to Flora and Clapper on U. S. Applications 617,049 and 583,345, respectively, or otherwise, or by the mutual consent of the parties, said fund shall be liquidated by dividing among the parties the monies in said fund in proportion to the amounts paid in by said parties as herein provided for.

"15. That in the event a patent shall be issued for improvements upon said heating units to persons other than parties to this agreement, then in such event, it is agreed that the parties hereto shall call a meeting and act as a unit in the negotiation for the use of such improvement, if desired, so as to make the same mutually available and on the same terms to all parties to this agreement, but that if the majority of the parties to the agreement determine not to contract for such improvement, then the parties to this agreement are privileged to contract therefor individually or collectively."

(9) said agreement was "based not only on the patents to be issued on said Clapper or Flora application which (were) the subject matter of (said) agreement, but also upon those issued upon any renewals, continuations, divisions of, or substitutes for, said applications, and also on any reissues or extensions of said patent or patents"; and (10) that unless otherwise terminated, the licenses granted were to "extend to the latest expiration date of any patent issued on said Clapper and Flora applications."

Under the original license that Comfort had from Clapper; Cab-Ette had from Flora; and Burch had from Halligan; and the license agreement executed by defendants on August 4, 1948, the defendant licensees, Comfort, Cab-Ette and Burch, built up substantial businesses, each doing several million dollars of business, in interstate commerce, manufacturing and selling tractor heating units during the time referred to herein. Each had numerous distributors in this country and Canada. Their collective sales value of tractor covers ranged from $200,000 to over a million dollars a year. Royalties paid to the patentees above named, collectively, has amounted to over five hundred thousand dollars.

Adhering to the agreement of August 4, 1948, the defendant licensees and Clapper set up a "Litigation Fund" as therein provided, for the purpose of defraying the expense of investigating and prosecuting infringers and defending against infringements of the Clapper and Flora patents. Said fund continued in existence from 1948 and the parties proceeded to use and control the same jointly as provided in said license agreement until on or about May 6, 1953. On that date the "Litigation Fund" was disbursed to Clapper and Flora, proportionately and the agreement of August 4, 1948 was terminated by the execution of a "Termination Agreement" which mainly resulted from a civil anti-

trust action instituted against the defendants and Flora and Cab-Ette by the United States, in this District Court. Thereafter, Comfort, Cab-Ette and Burch received and conducted their business operations in tractor covers under separate, non-exclusive licenses from said patentees, and any and all interim effects of the agreement of August 4, 1948 thereafter ceased to exist.

Prior to 1948, Burch sold tractor covers manufactured by it to the D & D Company of Fort Dodge, Iowa, a sales organization. The relations between D & D Company and Burch terminated in May of 1948. D & D Company thereafter made arrangements with Gasswint whereby the plaintiff companies undertook to manufacture tractor covers for D & D Company. D & D thereafter proceeded to sell "Work Warmers" manufactured by the plaintiffs, until June 17, 1949, when the D & D Company was declared an involuntary bankrupt. When plaintiffs began the manufacture of tractor covers for D & D Company, the officers of D & D, and the plaintiffs, had personal knowledge of the then pending patent applications of Clapper, Flora and Halligan. As a consequence, plaintiffs required and received from D & D Company indemnity against the results of any violations of such patent rights resulting from their manufacturing tractor covers for D & D. Before starting such manufacturing, plaintiffs were delivered by D & D Company, tractor covers which D & D and plaintiffs knew had been manufactured by Comfort or Burch as licensees of Clapper and Flora under patent applications then pending.

In the bankruptcy proceeding of D & D Company, the plaintiffs filed a claim as a creditor, based upon the agreements they had with D & D Company above mentioned. The substance of said claims was for loss sustained under an executory contract to manufacture and sell tractor

covers to D & D. There is no evidence in the instant record that any alleged Sherman Act violations by defendants had any impact on the plaintiffs' business at that time, or caused the termination of the contract plaintiffs had with D & D. In other words, D & D's bankruptcy was brought about and proceeded from other causes than the giving of notices of infringement served by Clapper on plaintiffs and D & D. Therefore, plaintiffs' claimed damages herein, for defendants' alleged violations of the Sherman Act, began to accrue sometime after June 17, 1949.

After D & D Company was adjudged bankrupt, plaintiffs continued to manufacture tractor heater covers and attempted to set up their own sales outlets. Such endeavors were not very successful. On August 3, 1949, plaintiffs entered into an agreement with Larsen and Swanstrom Company, another sales agency, to act as their sales representative in selling tractor covers manufactured by them. Thereafter, plaintiffs began advertising "Work Warmers" and that agency effected all sales of tractor covers manufactured by plaintiff up and until November 1, 1950. Before the last-mentioned agreement was entered into, Larsen and Swanstrom had personal knowledge that plaintiffs and D & D had been served with notices of infringement of Clapper's letters patent.

It was on November 24, 1948 that Clapper, through his counsel, Mr. Fred Roberts, caused notice to be served on D & D Company, of that Company's infringement of his letters patent. As a consequence thereof, D & D Company on December 3, 1948 filed a declaratory judgment suit in this District Court against Clapper, seeking a declaration that Clapper's patent was invalid. In that action Clapper counterclaimed against D & D Company for infringement. Said suit was never tried, because of the bankruptcy of

D & D Company, and refusal of the trustee in bankruptcy to continue with the prosecution thereof. It was ultimately dismissed by this Court, plaintiffs, and Larsen and Swanstrom, had full knowledge of the pendency of the above declaratory judgment action, and status thereof from time to time, before the same was dismissed.

On January 4, 1949, Clapper, through counsel, served notice of infringement of his letters patent on plaintiffs. Notice of infringement of the Clapper patent was later in that year served on Larsen and Swanstrom, because of their promotion and sale of tractor covers for plaintiffs. In October, 1949, the first of a number of letters was sent by Roberts to the jobbers of plaintiffs, established through Larsen and Swanstrom, to sell plaintiffs' tractor warmers, informing said jobbers that the tractor covers manufactured by plaintiffs were infringements of Clapper's letters patent, and sale thereof by such jobbers constituted contributory infringement which subjected said jobbers to infringement action by said patentee. Whether the manufacture and sale of tractor warmers by plaintiffs was a profitable business enterprise during the above period of time is not established by the instant record, probably because of the limited issue now before the Court. It suffices to say, however, that some jobbers did cease selling tractor warmers manufactured by the plaintiffs as a consequence of such infringement notice and that sales thereof to the public were thereby directly curtailed and limited although there is other evidence that the sale of plaintiffs' "Work Warmers" was retarded and limited because of poor manufacturing, and inefficiency in the packaging thereof by the plaintiffs. Plaintiffs herein do not contend that they were innocent infringers of the letters patent here involved, and they could not successfully do so under the evidence.

During all of the times herein mentioned, Clapper was represented by Mr. Fred M. Roberts, an Attorney, with offices in Kansas City, Missouri. After consummation of the license agreement of August 3, 1948, and establishment of the "Litigation Fund" provided for therein, Roberts, under instructions from Clapper and with the full knowledge and understanding of the other parties to the agreement of August 3, 1948, caused notices of infringement to be sent to D & D Company, to the plaintiffs, to Larsen and Swanstrom, and to all the known jobbers selling tractor warmers manufactured by plaintiffs. Knowledge of those and other claimed infringements came to Roberts from defendant licensees, from Clapper, Cab-Ette and Flora, and various other sources. When knowledge of a claimed infringement was made known to Roberts, he investigated the same and caused infringement notices to be served on the alleged infringers. Copies of said notices were sent to Clapper, Flora, and to said licensees; or they were otherwise generally informed by Roberts of the giving of said notices of infringements. Clapper and Roberts considered the former obligated under Section 13 of the agreement of August 3, 1948, to give notice and take action against claimed infringements of Clapper's letters patent within ninety days after notice thereof was received from licensees, or from any other source, and generally did so by serving notices of infringement. Clapper expended $15,288.24 from the "Litigation Fund" above mentioned, with the approval of Flora and the licensees, to defray the costs incurred in the giving of infringement notices and the prosecution of the infringement actions, including the one hereinafter referred to, instituted against the plaintiffs.

In January, 1950, after a second notice of infringement was served on plaintiffs by Roberts, several conferences resulted between Roberts and Mr. Don Burington, Attorney, then representing Gasswint, and the plaintiffs herein, and

considerable correspondence passed between said parties. The general topics discussed at such conferences, and covered in said correspondence, related to plaintiffs' infringement of the Clapper and Flora patents, (Roberts asserting the affirmative and Burington being dubiously negative); the amount of material plaintiffs had on hand for the production of "Work Warmers"; plaintiffs' desire to continue production of "Work Warmers" and if plaintiffs were not licensed to manufacture and sell tractor covers under said letters patent plaintiff would respect such patent rights; and the mutual desire of all parties, patentees, licensees and claimed infringers, to avoid costly patent litigation regarding those subjects. The sum total of all that transpired is that in March 1950 it was finally resolved by defendants, acting jointly and in concert with one another, and in furtherance of the agreement of August 4, 1948, that plaintiffs would not be given a general license to manufacture tractor covers, the subject matter of the Clapper and Flora patents, but would be given permission, under special license, to dispose of some 573 "Work Warmers" then on hand, and be allowed to complete the processing of 650 other "Work Warmers", all of which were to be disposed of by plaintiffs on or before November 1, 1950; if, in turn, plaintiffs would consent to the filing of an infringement action by Clapper and Flora against plaintiffs in the United States District Court for the Northern District of Iowa, and plaintiffs would consent to a decree being entered therein, sustaining the validity of the Clapper and Flora patents and enjoining plaintiffs from infringement thereof. On March 29, 1950, an agreement (Plf's Ex. 5) to that effect was reduced to writing, duly executed by all the parties plaintiff and defendant herein; and an infringement action, in due course, was instituted against plaintiffs and proceeded with as therein provided.

Throughout the period of time above mentioned, defendants concertedly acted to stop plaintiffs from manufacturing tractor covers in infringement of the Clapper and Flora patents. The full extent of all economic duress imposed by defendants on the plaintiffs in respect to that matter was that defendants claimed that the Clapper and Flora inventions were covered by valid letters; the giving of notices to plaintiffs and their distributors that they were infringing the same; and that if such claimed infringement was not abated patent infringement proceedings were imminent; that such proceedings were essential to the continued exercise and enjoyment by the licensees of Flora and Clapper in their manufacture and sale of patent tractor covers and royalties paid to said patentees for such privilege. Plaintiffs, although dubious about the validity of the Clapper and Flora patents, were fully aware of the nature, character and extent of the economic duress so being imposed upon them by defendants. Through advice of counsel and with full knowledge of the nature, character and extent of such duress, plaintiffs duly executed the agreement of March 29, 1950, referred to above.

On October 27, 1949, at a hearing held in the D & D Company bankruptcy proceedings, Gasswint, on behalf of plaintiffs, made request of Clapper for a license, at reasonable royalty, to manufacture and sell tractor covers, the subject of Clapper's letters patent. Clapper then told Gasswint that no such license could be granted by him, without the consent of his then licensees, under the written agreement he (Clapper) had with such licensees. Subsequent thereto and prior to March 29, 1950, Gasswint had other conversations with Clapper in which Gasswint requested a license under Clappef's letters patent. Clapper refused all such requests because of his obligation to Flora and the

defendants licensees under the agreement of August 4, 1948. Clapper's testimony is that he did not communicate such request to the parties signatory to the agreement of August 4, 1948, because he thought there was no point in doing so, in light of his obligation under that agreement, and previous discussions had with the other parties thereto regarding the granting of other licenses. The only conclusion to be reached is that Clapper's refusal to then grant plaintiffs a license under his letters patent was the direct consequence and result of the execution and adherence to the provisions of the agreement of August 4, 1948 by the parties signatory thereto.

After consummation of the agreement of March 29, 1950 and entry of a decree in the infringement action in the United States District Court of Iowa accordingly, plaintiffs completed the processing and sale of "Work Warmers" as therein provided until November 1, 1950. The reason plaintiffs discontinued such operations was the result of their agreement with defendants of March 29, 1950, and the impact upon them of the decree entered in the infringement action. Had plaintiff been successful in obtaining a bare license under the Clapper and Flora patents, on October 27, 1949 or at any time prior to November 1, 1950, plaintiffs would have continued in the business of manufacturing and selling tractor covers, the subject matter of said patents.

April 27, 1951, the United States of America filed a civil action in this District Court against the defendants herein, and Lee Flora and the Cab-Ette Company. On October 27, 1953, a consent decree was entered in that case, "before the taking of any testimony and without trial or adjudication of any issue of fact or law." By said decree defendants were, among other things, commanded by this Court:

"(A) Each defendant is ordered and directed, in so far as it has or may acquire the power or authority to do so, to grant to any applicant making written request therefor a license to manufacture, use and sell tractor cabs under United States Patent No. 2,452,834 and Patent No. 2,461,974 and any other patent relating to tractor cabs issued to or acquired by any such defendant within five years from date hereof, such license to be for the full unexpired term of the patent or patents."

It was further provided in said decree:

"The defendants Clapper and Flora are ordered and directed within sixty days after the entry of this Final Judgment to send a copy of this Final Judgment to each of their present licensees under any patent or patents to which Section IV of this Final Judgment may apply and to each applicant who has, in writing, heretofore applied for and has not received a license to manufacture, use or sell tractor cabs under any such patent or patents. In the case of applicants who may apply for a license to make, use or sell tractor cabs pursuant to Section IV of this Final Judgment, a copy of this Final Judgment shall be sent promptly to each such applicant immediately after receipt of any such application. Each defendant, not a patentee, shall upon inquiry from an applicant for a license, advise the applicant to whom the application should be addressed, if known."

Pursuant to the mandates of said decree, a copy thereof was sent by Roberts to plaintiffs on December 15, 1953. Plaintiffs did not thereafter make any request of the patentees Clapper or Flora for a license to manufacture and sell the subject matter of their respective patents.

In the above factual background plaintiffs instituted the instant action against the defendants under Sections 1, 2, 14, 15 and 22 of the Sherman and Clayton Acts, Sections 1, 2, 14, 15 and 22, Title 15 U.S.C.A. The original claim

asserted by plaintiffs was the alleged existence of a conspiracy between the defendants, and monopoly, in restraint * * * of interstate trade and commerce, having as their objective: price fixing; execution of cross-licensing agreements; the making and execution of contracts and agreements which resulted in the granting of patents to Clapper and Flora; the denial of licenses to "other manufacturers" than Comfort, Cab-Ette, and Burch; the threatening of plaintiffs and their dealers with infringement suits which forced plaintiffs to enter into a limited licensing agreement and submit to a consent decree in an infringement action, all of which caused the plaintiffs to abandon their business of manufacturing and selling "Work Warmers", to their damage. Plaintiffs have adduced no evidence before this Court and have made no claim relating to impact of any such alleged conspiracy or monopoly upon any other phases of business conducted by them, (i. e. awnings, tents, tarpaulins and other canvas goods) other than to that part of their said businesses relating to the manufacture and sale of "Work Warmers".

By order of Court entered at pre-trial conference the issue joined as to impact of conspiracy and monopoly upon all the plaintiffs' business operations, was separated from the issue of damages, the parties directed to adduce all evidence thereon, and that issue be first submitted to the Court for adjudication and determination before consideration be given to the quantum of damages, if any, sustained by plaintiffs. The parties have cooperatively complied with that order. Hence the record presently made should be considered, examined, and resolved in the light of the above "limitation of issue" order.

Before proceeding further, it is well for the Court to state, in view of the issues raised and presented by the plaintiffs' amended complaint, and the evidence adduced

by the parties, what is *not* involved in this Sherman Act case. There is no evidence in the instant record relating to any "conspiracy to fix prices of tractor covers," if engaged in by the defendants, as having any impact, or causing any damage or injury to the plaintiffs' business operations. There is no evidence in the record relating to control by defendants of unpatented products, or material, which control, if existing, created any impact, or caused any damage or injury to the plaintiffs' business operations or property. Nor is there any evidence as to any impact, damage or injury resulting to the plaintiffs' businesses as a consequence of the control of place of manufacture, distribution of products, or division of distributors, even if engaged in by the defendants. The issue herein for determination, tersely stated, relates to an alleged conspiracy, having as its object the pooling of patents, control thereover by others than the patentees, resulting in giving of notices of infringement, and limiting the grantng of licenses by patentees in restraint of interstate trade and commerce: and, attempt to establish a monopoly in restraint of such commerce through joint control by defendants of the subject matter of said patents, and the extent of impact thereof on the business operations of the plaintiffs.

[1-3] It is an axiom in private Sherman Act litigation that before damages may be recovered for claimed violation thereof, "[plaintiff] must establish two things: (1) A violation of the Anti-Trust Act and (2) damages to the plaintiff proximately resulting from the acts of the defendant which constitute a violation of the Act." Glenn Coal Co. v. Dickinson Fuel Co., 4 Cir., 72 F.2d 885, 887, and cases therein cited. The mere fact that the existence of a conspiracy to raise prices, control unpatented products, limit place of manufacture of goods, the distribution

of products, or division of distributors, is established, is not sufficient, *ipso facto*, to support a judgment for damages in favor of plaintiffs under the Sherman Act. Twin Ports Oil Co. v. Pure Oil Co., 8 Cir., 119 F.2d 747, 751. Mere possibility, conjecture, or surmise that damage to plaintiffs exists from such violations of the Act, without showing a causal connection between a specific violation and damages claimed, is wholly insufficient. Ronson Patents Corp. v. Sparklets Devices, Inc., D.C.Mo., 112 F. Supp. 676. With those legal propositions in mind, we now state that evidence appearing in the instant record, whether it may be classified as a mere scintilla, or substantial, relating to price fixing, sale of unpatented articles, control of place of manufacture, distribution of products, or division of distributors, has not been shown to have had any impact on plaintiffs' businesses, because no causal connection is established in the evidence between any such matters and any of the plaintiffs' business operations. Such matters will hereafter be examined and considered from a broad aspect, only on the issue of conspiracy or monopoly actually existing, having some impact on the plaintiffs' businesses; namely, interference with plaintiffs' business operations by the giving of infringement notices, and refusal to grant a license to plaintiffs after valid request therefor. That, as we perceive the issue now before the Court, and evidence adduced thereunder, is the proper delimitation to be placed on the question of impact on plaintiffs' businesses from any claimed conspiracy or monopoly by defendants, when measured by the Sherman Act standards.

[4-9] By the agreement of August 4, 1948, the patentees, Clapper and Flora, granted a non-exclusive and non-transferable license to Comfort, Cab-Ette, and Burch, to manufacture and sell their invention. The limitations

imposed on the licensees by said agreement (i. e. that licensees would manufacture the inventions "at their respective * * * named addresses and in no other place or places"; that no other licenses would be granted "without obtaining the written consent thereto of the *remaining* parties to the agreement"; that if a license so granted was terminated as provided in paragraph 8 thereof, "Flora or Clapper, respectively, shall be at liberty to license other licensees"; that the parties would "mutually agree upon procedure for (the) disposition" of infringement suits; and the fact that the patentees were not themselves excluded from the field of manufacturing, using and selling their respective invention); reveal that the rights granted to licensees thereunder were not intended to be an assignment of patent rights, nor the grant of an exclusive license. Cf. Broderick v. Neale, 10 Cir., 201 F.2d 621. An exclusive license under patent law is tantamount to an assignment of patent rights, and any conveyance of such rights which does not either give: (1) "The exclusive right to make, use and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the United States * * * is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement." Waterman v. Mackenzie, 138 U.S. 252, 255, 11 S.Ct. 334, 335, 34 L.Ed. 923. Although a "distinguishing characteristic of an exclusive license is a promise, express or implied, by the licensee, that he will not thereafter license others," Western Electric Co. v. Pacent Reproducer Corp., 2 Cir., 42 F.2d 116, 119 that fact does not, standing alone, characterize a license as being exclusive. Where two or more non-competing patent rights are granted to different licensees by a single instrument, and veto power over each such patent is not only given to the

co-patentees, but is also given to holders of similar licenses, they are not exclusive, but can only be considered non-exclusive. Cf. Walker on Patents, Vol. 2, pp. 1459-1463. Such is the legal effect of the licenses granted by the agreement of August 4, 1948; they were non-exclusive licenses, and not exclusive licenses as contended by defendants. Therefore, restraints imposed upon others than the licensees named in that agreement (i. e. upon the patentees and third persons) are to be measured, not by patent law standards, but by rules governing the validity of restrictions on competition according to Sherman Act standards. That is so because the patent laws were designed to only protect the patentee, and his assigns, in the whole or partial enjoyment of the fruit of his invention, and any restraint upon competition created by a license agreement that does not inure to the patentee, or his assigns, is not protected by the patent laws. Hence it is held that an agreement by a patentee which gives a non-exclusive licensee a veto power in the selection of other licensees, is invalid according to Sherman Act standards. United States v. Besser Mfg. Co., D.C.E.D. Mich., 96 F. Supp. 304, affirmed 343 U.S. 444, 72 S.Ct. 838, 96 L.Ed. 1063; United States v. American Linen Supply Co., 7 Cir., 141 F.Supp. 105; United States v. Crown Zellerbach Corp., 7 Cir., 141 F.Supp. 118. It cannot be successfully contended by defendants that the terms of the license agreement, supra, are not, *per se*, violative of Section 1 of the Sherman Act in the aspects hereinabove considered, and we so adjudge it.

[10] We think said agreement is also violative of Section 2 of the Act, in that it manifests an attempt to monopolize, by the combining of non-competing patents in a single agreement, by competitors, and gives to the parties to the agreement veto power over patent rights

that are not referable to their individual business, the patents or licenses granted, and this is true, even though the licensees may have continued to compete with each other in the manufacture and sale of tractor covers after the execution thereof. They were jointly given an exclusive market and control thereover by the terms of said agreement and not singularly as a consequence of patent privileges acquired. United States v. Line Material Co., 333 U.S. 287, 68 S.Ct. 550, 92 L.Ed. 701. We shall not undertake to analyze all the provisions of said agreement that we considered to be violative of the above sections of the Sherman Act (there appear to be several) but confine our consideration thereof to those features which we perceive pertinent to the issue of impact as above delimited.

[11] By Section 13 of the agreement, the parties agreed to and the evidence establishes that they did act jointly in respect to "infringements" of the letters patent in question, and "mutually agree upon procedure for their disposition." In Section 14, Clapper and the licensees set up a "Litigation Fund" to be used for the prosecution of infringements of both said letters patent, upon approval of a majority of the parties to the agreement, and the evidence is that said fund was actually used by them for that purpose. The clear intent of the parties, gleaned from the verbiage contained in paragraphs 13 and 14, supra, and from the evidence herein was giving to each party thereto a separate and collective right to bring and control infringement actions, when no such right or power legally existed in the licensees, or opposite patentee, so to do under patent law; that they jointly and cooperatively intended to and did unite in the prosecution, and use of the "Litigation Fund" for that purpose. The action of the parties as revealed by the evidence is that they did, pursuant to the said agreement, join hands, through Roberts,

in the giving of infringement notices to plaintiffs and their dealers, and in so doing they intended to curtail and ultimately stop the manufacture and distribution of tractor covers by plaintiffs, and sale thereof by plaintiffs' distributors. The evidence clearly establishes that defendant licensees were the major manufacturers of tractor covers and held a dominant position in that field of interstate trade and commerce, and that if the agreement of August 4, 1948 was carried out by the parties, according to its terms, as it was, that the monopoly granted to said licensees gave them virtual control of that market and made it impossible for plaintiffs to obtain any rights under the patents in issue, or legitimately enter the field of manufacturing and selling tractor covers. It is the fact of combination and concert of action by the parties to do the very things that they claim they had a right to do under said agreement, collectively and jointly, that spells out unlawful use of patent monopoly by them, in violation of Sections 1 and 2 of the Sherman Act.

[12-15] It is no defense of the agreements of August 4, 1948, or March 28, 1950, or for the giving of infringement notices and bringing of the infringement action as mentioned above, to say that Clapper and Flora had the right to grant separate licenses to defendant licensees and that said patentees had the right under patent law to give notices of infringements of their respective patents, and to bring infringement actions. It is conceded that such are legal rights accruing to a patentee, or his assign or assigns. But what may be legally done by a patentee, or his assign, singularly or collectively, is no criterion for the measurement of legality of the agreement of August 4, 1948, and what was actually done by the defendants in furtherance thereof as shown by the evidence. What Clapper, or Flora, separately, might legally have done and

what was done by them in concert of action with each other and with the licensees herein are two different matters. The fact that concert of action, violative of the Sherman Act, is accomplished by legal means, does not remove the terminal result thereof from the prohibitions of the Act. A conspiracy or combination having as its object, or effect, a restraint of interstate trade and commerce, whether accomplished by legal or illegal means, falls within the ambit of Sections 1 and 2 of the Sherman Act and is condemned thereby. Patent rights give no protection from the prohibition of the Sherman Act, when they are asserted, controlled, or used in consequence of an agreement that is in restraint of interstate trade or commerce. Cf. United States v. New Wrinkle, Inc., 342 U.S. 371, 72 S.Ct. 350, 96 L.Ed. 417. When two individual patentees combine their valid patent monopolies and contract between themselves and with their licensees to secure mutual benefits for themselves and their licensees that are not given to them by the patent laws, and which agreement gives to the opposite patentee and the licensees a right of control over patent rights that may be asserted, and is used in restraint of interstate trade and commerce, the purpose and result of such an arrangement and conduct is clearly in violation of Sections 1 and 2 of the Sherman Act. Cf. United States v. United States Gypsum Company, 333 U.S. 364, 68 S.Ct. 525, 92 L.Ed. 746; United States v. Line Material Co., supra; and United States v. New Wrinkle, Inc., supra.

[16, 17] The only conclusion to be drawn from the evidence is that the agreement of March 29, 1950, was directly the result of joint and concerted action on the part of defendants, and this is so, whether plaintiffs voluntarily, or as the result of economic force (their claimed financial inability to defend themselves against the claims of infringement), acquiesced therein. Each of the defend-

ants individually, or through their authorized representative, are shown to have acted in some degree in furtherance of the consummation of that agreement. They each either proffered, controlled, directed, or participated in the consummation of the agreement that was made with the plaintiffs on March 29, 1950, or ratified and acquiesced therein. Prior to the time of negotiating that agreement, plaintiffs requested and were refused by Clapper the privilege of a license under his letters patent. During the negotiations leading up to said agreement, a like request was made and refused by Roberts. The evidence surrounding such requests for, and mode of refusal of, a license is such that the only logical conclusion to be reached therefrom is that the refusal was premised in the agreement of August 4, 1948, and that the defendants concertedly agreed pursuant thereto, that no bare license to manufacture and sell tractor covers under the Clapper or Flora patents would be granted to the plaintiffs. That is so, even though no specific request for a license under the Flora patent is shown, for the further conclusion to be gleaned from the evidence is, that if any such request had been made it would likewise have been refused as the result of said agreement and conspiracy between the defendants. That conclusion clearly arises in the evidence and, we think, was made known to Gasswint and Burington prior to the time of the execution of the agreement of March 29, 1950. Hence said agreement of March 29, 1950, resulting from conspiracy between the defendants, being in restraint of interstate trade and commerce, because plaintiffs were only granted a limited license thereby, cannot be legally binding upon the plaintiffs. The granting of a limited license to plaintiff by said agreement was manifestly the result of a conspiracy. That plaintiffs agreed thereto did not make that agreement valid. The restraint of trade or commerce occasioned

thereby continued after the execution thereof and was only relaxed to the extent of the limited license granted.

[18, 19] After the consummation of the agreement of March 29, 1950, the infringement action was instituted by Clapper and Flora in the United States District Court for the Northern District of Iowa. Plaintiffs, throughout the pendency of the instant action, have conceded that they entered their appearance in that action, that the decree entered therein remains in full force and effect, and, as a consequence thereof, they "cannot resume the manufacture of tractor covers with freedom" from contempt for violation of the terms of that decree, unless plaintiffs are granted a license under the Clapper and Flora patents. We agree that plaintiffs are so bound by said decree and that the validity of the Clapper and Flora patents is thereby made *res judicata* as between plaintiffs and said patentees. Plaintiffs have made no effort whatsoever to have said decree annulled or vacated by the Court in which it was entered before bringing the instant action. They did not proffer a defense in that action that was known to them, which, if asserted, would have been cause for that Court to refuse to entertain the action. Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 64 S.Ct. 268, 88 L.Ed. 376. Thus they stand before this Court as having been amerced as infringers of the Clapper and Flora patents by a court of competent jurisdiction, and conceding that to some extent they ceased manufacturing "Work Warmers" as a result of the impact of that decree. The conclusion is that the impact of any conspiracy between the defendants, resulting from the giving of notices of infringement and prosecution of an infringement action against the plaintiffs terminated with the entry of that decree. Hence plaintiffs cannot recover herein from defendants damages resulting to any of their business operations, after the entry of said decree, because of claimed

impact in the giving of notices of infringement to dealers, nor as a consequence of bringing that infringement action against the plaintiffs. The Court cannot, in this action, relieve plaintiffs from the legal effect and consequences of that decree. There is no such issue before this Court, though it is established by the evidence that said action was instituted pursuant to a conspiracy, in violation of the Sherman Act. Clapper and Flora can still claim the benefits of that decree against the plaintiffs, until it is set aside by the Court in which it was entered. Plaintiffs' cessation of operations directly and solely resulting from the impact of that decree are *damna absque injuria*.

[20-26] The question remains: Does plaintiffs' amercement as infringers of the Clapper and Flora patents prevent them, as a matter of law, from claiming damages for any impact of conspiracy because of refusal of a license as a result of conspiracy, even though they were carrying on some business in violation of these patents? We now think not. Concededly, Clapper and Flora, as patentees, could individually have refused a license to the plaintiffs. But, notwithstanding their individual right to so act, they, and the other defendants, had no legal right to act in concert and join hands under an agreement shown to be in violation of the Sherman Act, to bring about that result. The fact that interstate commerce is carried on in violation of some law, does not validate a conspiracy conceived and carried out in restraint of commerce in violation of the Sherman Act. The award of damages in a private Sherman Act case is authorized by the Congress as a means of vindication of the free trade policy sought to be protected by that Act, even though such trade may be carried on in violation of some other law. It is for that reason that the courts hold that a collateral defense of *pari delicto* is no defense to such actions.

Cf. Moore v. Mead Service Co., 10 Cir., 184 F.2d 338, vacated 340 U.S. 994, 71 S.Ct. 528, 95 L.Ed. 681, reconsidered, 10 Cir., 190 F.2d 540; Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219; and Kobe, Inc., v. Dempsey Pump Co., D.C., 97 F.Supp. 342, affirmed 10 Cir., 198 F.2d 416. It is noted that in the first three cases here cited, the *pari delicto* defense was not established in respect to an illegal subject matter, damages to which were claimed because of Sherman Act violations. The violations of law therein considered were collateral to a subject matter legally moving in interstate commerce. A close examination of the record in the Kobe case, supra, will reveal that the patented article there involved was limited to the design of a pump, covered by a patent which expired eight months before the trial, the sale of which during the period of conspiracy and monopoly by defendants was only a minor part of Dempsey's business affected by Sherman Act violations; and, that the issue of *pari delicto* was not raised as to the damages claimed or allowed therein. In the case at bar we have a different situation. Here plaintiffs seek to recover loss of profits from the sale of devices adjudged to be in violation of both the Clapper and Flora patents. Fortifying authorities need not be cited to sustain the proposition that plaintiffs, as infringers, had no legal right to make any profits from the sale by them of infringing devices and could have been made to account therefor in an appropriate action. That they were not required to do so, or were released from that obligation, is of no moment here. The fact is, that the anti-trust laws contemplate injury and damages to a legal right, and plaintiffs having no legal right to profits from the sale of infringing tractor covers, cannot claim damages by way of loss of such

illegal profits. Cf. Keogh v. Chicago & Northwestern R. Co., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183; Okefenokee Rural Electric Membership Corp. v. Florida Power & Light Co., 5 Cir., 214 F.2d 413; and Maltz v. Sax, 7 Cir., 134 F.2d 2. As above stated, plaintiffs, as infringers of Clapper's or Flora's patents, could be held responsible therefor by those patentees. But such infringement did not give rise to any right in said patentees and the other defendants to take concerted action against the plaintiffs on that score. Paraphrasing what was said in the Kiefer-Stewart case, supra, the fact that plaintiffs were infringers did "not legalize the unlawful combination by [defendants] nor immunize them against liability" for damages the plaintiffs may have sustained to their legal business or property, resulting from conspiracy. 340 U.S. loc. cit. 214, 71 S.Ct. loc. cit. 261.

[27] The privilege of restraining others is granted to the owner of letters patent. He is given no right or privilege to restrain himself, or to join with others and impose restraints not given by patent law. Cf. Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 33 S.Ct. 9, 57 L.Ed. 107.

[28] In light of the foregoing, we hold that plaintiffs cannot recover damages herein by way of loss of profits from actual or potential sales they might or could have made solely from the manufacture and sale by them of their infringing tractor covers. But, in connection with such infringing business, plaintiffs are shown to have owned machinery, tools and dies capable of being used in the legitimate manufacture and processing of tractor covers which had some value. The fact that such machines, tools and dies were used in the production of infringing tractor covers did not destroy their value. Had plaintiffs been granted a license under the Clapper and Flora patents,

such machinery, tools and dies could have been used in the legitimate production of tractor covers. The evidence is that plaintiffs were denied such a license as a direct result of defendants' concerted acts and conduct. If plaintiffs sustained any damage, or loss, to such machinery, tools, or dies, resulting therefrom, they may attempt to make proof thereof. If plaintiffs can establish that they suffered any loss of profits in their business, directly resulting from refusal of a license to manufacture and sell tractor covers under the Clapper and Flora patents after valid request therefor, solely because of conspiracy, then plaintiffs may undertake to make proof thereof. The impact of any such conspiracy must be held to have been imposed on a legal right, resident in the plaintiffs to make and negotiate for such a license and not have it refused as a consequence of conspiracy. If they were so precluded by a conspiracy, as the evidence shows they were, from thereby continuing in business, they may assert a claim therefor under Section 4 of the Clayton Act, Section 15, Title 15 U.S.C.A.

It is unnecessary at this time to consider the nature, character, or extent of any such damages. That is a matter to be considered when the issue of damages is reached. Large or small, plaintiffs have the right to attempt to make proof of any and all such damages so occasioned to their business or property. However, the proof adduced by the plaintiffs respecting damages to their businesses or property must be such as is shown to have accrued between June 17, 1949 and May 6, 1953. That is to say, between the date Gasswint, on behalf of plaintiffs, first made request for a license from Clapper during the D & D bankruptcy proceedings and date of execution of the agreement terminating the "License Agreement" of August 4, 1948, and the distribution of the "Litigation Fund"

between Clapper and Flora. The conspiracy and monopoly here established is shown to have terminated at that time.

This action should be dismissed as to the plaintiff Waterloo Tent and Awning Company, because that Corporation is no longer in existence. There has been no showing of a right resident in the other plaintiffs to recover any damages Waterloo may have sustained as a result of the conspiracy here charged to exist between defendants. An order of dismissal will be entered herein accordingly when final judgment is entered between the other parties.

Defendants' motion for judgment at the close of all the evidence, filed May 9, 1956, is by the Court overruled.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 590

CLYDE E. CLAPPER, *Petitioner*

v.

THE ORIGINAL TRACTOR CAB COMPANY, INC., and STANLEY WILLIAMS, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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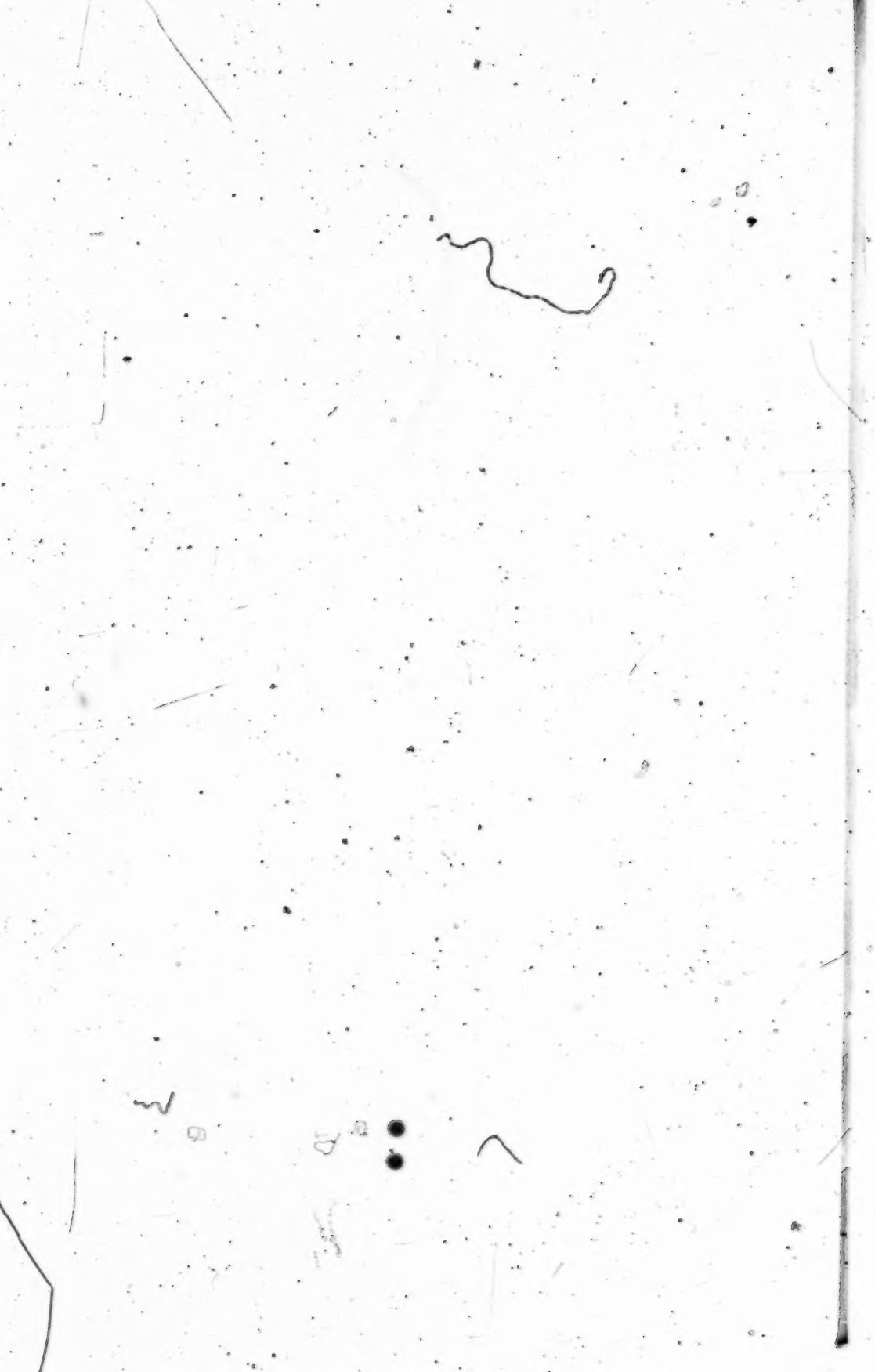

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The Petition for a writ of certiorari is bottomed on an allegation of a conflict between the Second Circuit and the Seventh and Tenth Circuits as to the construction of the anti-trust and patent laws. No affirmative assertion is made of a definite conflict of opinion between those Circuits on the same issue, and none can be made, because the decision in the Second Circuit, to which reference is made, did not involve the same question decided by the Court below in accordance with the decision in the Tenth Circuit.

The Petition, therefore, is opposed by Respondents on the ground that no valid reason is presented for granting the writ; and none of the usual reasons for the writ has been shown to be applicable here.

STATEMENT OF THE CASE

This suit was instituted in April, 1950, for an infringement of an invalid patent, in furtherance of a conspiracy to violate the anti-trust laws of the United States.

The License Agreement (PA491)* of August 3-4, 1948, has been adjudicated to be illegal and the petitioner has been enjoined from enforcing its provisions (Ex. C, A107).

When the petitioner and his co-conspirators attempted to force the respondents out of business, they sought to exert from them an agreement to discontinue; but at the meeting held in Chicago on September 12, 1949, with the respondent, Williams, and his attorney, no agreement was reached to that effect (A14-15). The "spokesman" referred to in the findings of the District Court, who acted at that meeting, was the present attorney for the petitioner, who took an active part in the conspiracy.

There is no evidence that the respondents ever recognized the effectiveness of the Clapper patent, or that they paid royalties to Clapper for a license under that patent. The petitioner's statements with respect to these matters are completely false, as they are with respect to many other matters contained in the brief.

* "PA" refers to the Plaintiff's Appendix in the Court of Appeals; "A" refers to the appendix to the Petition for Certiorari.

Neither is there evidence that the respondents instigated the Department of Justice suit (A107), as erroneously and falsely stated in the petition. As noted by the District Court, the reason for allowing the petitioner to procure a consent decree which enabled him to continue the prosecution of this illegal suit for alleged infringement of an invalid patent is entirely unexplained (A46-47):

> "Instead of withdrawing the complaint for patent infringement, the plaintiff and his co-conspirator, Flora, chose to pursue the action beyond the date of that decree, even though they knew it was a remnant of their earlier conspiratorial actions." (A47)

QUESTION 1

Question 1 does not properly state the basis of the decision by the Court of Appeals below.

The attorneys' fees and expenses allowed Respondents for defense of the patent infringement suit were predicated on the findings by the District Court that this patent infringement suit was filed as an act of conspiracy in violation of the anti-trust laws:

> "41. * * * in accordance with an understanding reached by the parties to the agreement of August 3-4, 1948, at that meeting, this action was instituted in April, 1950, claiming infringement of the Clapper * * * patents".
>
> (PA 380)

> "71. The evidence shows that the Defendant, Original, has incurred in fees and expenses obligations for $28,244.31 in defense of the patent infringement action instituted by the Plaintiff and Flora as a part of the conspiracy in violation of the anti-trust laws."
>
> (PA 390)

This was not an ordinary action for patent infringement. It was instituted, and has been maintained, by the petitioner in furtherance of the anti-trust violation and in accordance with the illegal agreement which was the basis of the counterclaim under the Clayton Act. This fact should be borne in mind in considering the award to the Defendant of the cost of defending the patent infringement suit.

This Court has stated many times that a patent infringement action cannot be instituted and maintained on the basis of a patent that is used as a part of a conspiracy in violation of the anti-trust laws. *B. B. Chemical Co.* v. *Ellis*, 314 U.S. 495; *Morton Salt Co.* v. *The G. S. Suppiger Co.*; 314 U.S. 488; *Mercoid Corp.* v. *Minneapolis Honeywell Regulator Co.*, 320 U.S. 680; *U. S. Gypsum Co.* v. *National Gypsum Co.*, 352 U.S. 457.

The findings of fact of the District Court (PA 365-400), establish that this patent infringement suit was instituted as a part of a conspiracy in violation of the anti-trust laws. There is no finding of fact by the Court below that the Plaintiff has ever purged himself of this violation, although, in the Petition, it is asserted that the petitioner did purge himself of the violation during the course of this litigation. The important point, moreover, is that the suit has continued and has been maintained by the petitioner, so that its filing "in violation of the anti-trust laws" has remained a continuing offense by the petitioner through the pendency of the suit.

If the petitioner did, in fact, purge himself of the violation, he should have dismissed the suit for patent infringement, but he chose not to do so and, on the

contrary, claimed damages for patent infringement not only for the entire pendency of the litigation but, in fact, for six years next preceding the filing of the suit in April, 1950 (PA 56, paragraph XVIII).

Question 1, as propounded by the Petitioner, omits the very important condition with respect to the patent infringement action, that it was filed as a part of the conspiracy in violation of the anti-trust laws. That is the circumstance here involved and it is the basis for the award of damages for this Clayton Act violation, including the cost of defending the patent infringement action.

The Court of Appeals called attention to these circumstances as the basis for its decision on the method of handling the cost of defending the patent infringement action. Note the statement:

> "As Defendants point out, however, as late as 1955, Clapper was still seeking injunction and damages for the preceding 6-year period." (A83)

Again, the Court of Appeals, after referring to the circumstances under which attorneys' fees are allowed to the successful party in a patent infringement action, under Title 35, U.S. Code, § 285, noted that those cases did not do full justice to this situation, on the basis of the findings of fact of the District Court:

> "On the other hand, the District Court's reference to the use of the patent by the patentee and his licensees can have reference only to the anti-trust violations. The record of this eight-year long litigation fully supports such a finding, and defendants are entitled to have their reasonable attorneys' fees and expenses included as an element of damages in the anti-trust action."

It is clear from these statements that the Court of Appeals below treated the question of attorneys' fees for defense of the patent infringement action as an element of compensatory damages and reversed the conclusion of law of the District Court on the basis of that same District Court's findings of fact.

The decision of the Court of Appeals was controlled not by the mere fact that this was an action for patent infringement, but by the findings of fact that the action for patent infringement was instituted and has been maintained by the petitioner as a part of the conspiracy in violation of the anti-trust laws. This circumstance should be included as a part of the question presented to this Court.

QUESTION 2

The Petitioner does not unequivocally assert, either in his question or in argument that the Court of Appeals below has decided this matter contrary to the decision of the Second Circuit in *Straus* v. *Victor Talking Machine Company*, 297 Fed. 791. That is, no doubt, due to the fact that a careful analysis of these cases will show that the real question decided by the Court below was different from that decided in *Straus* v. *Victor*. The real question decided below is as noted above under Question 1, that the action was filed as a part of the conspiracy in violation of the anti-trust laws. This was also the basis of the decision by the Tenth circuit in *Kobe, Inc.* v. *Dempsey Pump Co.*, 198 F. (2d) 416. This case in the Tenth Circuit affirmed the decision of the District Court reported in 97 F. Supp. 342, where it will be noted in findings of fact 76 and 77, that the suit for patent infringement had been commenced and maintained as an act of violation of

the anti-trust laws, and that was the basis for the inclusion of the cost of defending the patent infringement action as an element of damages under the anti-trust laws. That was also the basis of the decision of the Court of Appeals below. In this case, the District Court made similar findings, setting forth that the suit was instituted as a part of the conspiracy.

When we turn to *Straus* v. *Victor*, however, we find a very different situation. There were no findings of fact in that case, but the Court does make clear that its decision is predicated on a finding that the suit for patent infringement was not filed as a part of a conspiracy in violation of the anti-trust laws. The Petitioner conveniently omits this statement from his argument and quotation (Petition, page 17). The decision of the Court of Appeals recites the arguments with respect to the filing of the action for patent infringement and then sets forth:

> "But all this is no evidence in the sense of the law that the bringing of a suit to establish rights was 'a step in pursuance of the combination' ".
> (page 797 of 297 Fed.)

It is clear from this statement of the Court of Appeals that its decision with respect to attorneys' fees was predicated on a finding that the action for patent infringement was not filed in furtherance of a conspiracy in violation of the anti-trust laws. Without that significant finding, the Court held that it would be inappropriate to include the cost of defending the action for patent infringement as an element of compensatory damages. This is further confirmed by the concluding paragraph of that opinion on this point:

> "Never was it more necessary than now to preserve unimpaired this right so vital to the public

welfare and so thoroughly a part of our theory of government. New economic problems increasingly arising in a constantly developing nation require solution, and hence lead to legislation. The statutes thus enacted to meet these problems can rarely, if ever, be so certain and detailed in expression that their meaning or extent can be ascertained without judicial determination. The difficulty which attends their construction is best shown by the wide variance in the opinion of the courts and the constant resort to the Supreme Court for authoritative decision. It is thus not strange that lawyers and laymen may differ as to the meaning of such statutes, and it would be a negative of the principle and right of free access to the courts to hold that the submission of rights to judicial determination involved a dangerous gamble which might subject the loser to heavy damage."

(page 799 of 297 Fed.)

As this Court has repeatedly remarked, patentees, such as the Petitioner here, can take no gain from patents that are used as a part of a conspiracy in violation of the anti-trust laws. Where they are to be barred from recovering in actions for patent infringement under that circumstance, they should not only be required to pay the cost of defending such action for patent infringement but should be penalized therefor in the same manner and for the same purpose as any other damage caused by the violation of the anti-trust laws. The action for patent infringement is but one act of the tort feasors for which damages are coverable. The losses suffered by the respondents as a result of those acts are recoverable as damages and are to be tripled under the terms of the statute. That applies not only with respect to the losses suffered due to stoppage of business, assessed by the District Court and

affirmed by the Court of Appeals, but also the losses suffered by reason of being compelled to defend an illegal action for patent infringement.

It is clear from these circumstances that there is no diversity of opinion with respect to the issue in *Straus* v. *Victor*, as compared with the decision below and *Kobe* v. *Dempsey*, but on the contrary, the same issue was involved in *Kobe* v. *Dempsey* as in the decision below. It was decided the same way on the basis of distinguishing the decision of the Second Circuit in *Straus* v. *Victor*. On the question presented in this case, there is unanimity of opinion between Circuits and no basis whatever for a writ of certiorari.

QUESTION 3

It has been pointed out above that the District Court allowed the amount of attorneys' fees and costs in defending the patent infringement action, stating that the suit was filed as a part of the conspiracy. There is no disputed fact between the District Court and Court of Appeals, but the latter reversed the conclusion of law of the District Court and held that the findings of fact of the District Court sustained the inclusion of the attorneys' fees and expenses in the patent infringement action as compensatory damages.

Without considering whether or not these facts would have justified an award of attorneys' fees under U.S. Code, Title 35, Section 285, it is clear from what has been set out above that the cost of defending the patent infringement suit filed as a part of the conspiracy should be included as compensatory damages. The fact that the District Court committed an error of law does not prevent the Court of Appeals from correcting that error of law; it is its duty to do so and

properly stated the basis for handling the cost of defending the patent suit in the damage claim.

QUESTIONS 4 AND 5

These questions deserve little consideration. They involve no error of law which would justify the issuance of a writ of certiorari.

The Petitioner would have the Court review all of the evidence with respect to the losses suffered by the Respondent, Original, and the claim for damages and the award of attorneys' fees. The Supreme Court should not be burdened with such questions. It is the duty of the trial court to decide issues of fact, to determine the effects of the evidence, and to decide matters of discretion such as the award of attorneys' fees. In the absence of an abuse of discretion, an appellate court should not be asked to, nor should it in fact, review the award. These questions clearly are outside of the scope of review by a writ of certiorari.

CONCLUSION

The questions presented in the Petition are an imposition on the Court.

There is no conflict of opinion between different circuits on the same issue and no allegation of a conflict between the decision below and prior decisions of this Court.

The Petitioner would have the Court review the evidence to determine whether damages were properly awarded, but such is not the function of a writ of certiorari. This Court should reserve the grant of writs to situations where important legal questions are involved.

Under the circumstances, the Petition should be summarily denied.

Respectfully submitted,

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